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REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF
MINNESOTA.

VOL. X.

BY
WILLIAM A. SPENCER,
ATTORNEY AT LAW.

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OFFICERS
OF THE
SUPREME COURT OF THE STATE OF MINNESOTA,
DURING THE PERIOD OF THESE REPORTS.

Hon. THOMAS WILSON, Chief Justice.

" S. J. R. McMILLAN, }
" JOHN M. BERRY, } Associates.

" GORDON E. COLE, Attorney General.

GEORGE F. POTTER, Clerk.

WM. A. SPENCER, Reporter.

JUDGES OF THE DISTRICT COURT.

1st Judicial District, Hon. CHARLES McCLURE.

2d " " " WESCOTT WILKIN.

3d " " " LLOYD BARBER.

4th " " " C. E. VANDERBURGH.

5th " " " N. M. DONALDSON.

6th " " " HORACE AUSTIN.

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ERRATA.

On page 37, line 17, for 'suggestive' read 'suggested.'

" " 37, " 21, " 'could' read 'would.'

" " 62, " 2, " 'land was' read 'land which was.'

" " 74, " 22, " '1 Ch. R.' read '1 Ch. Pl.'

" " 247, " 9, " 'inquiry' read 'injury.'

" " 275, " 20, " 'in real estate,' read 'or real estate.'

" " 283, " 30, the mark of interrogation (?) should be a comma (,).

" " 286, " 5, before the words 'a change' insert 'an affidavit for.'

" " 459, " 26, for 'last' read 'least.'

" " 459, " 35, " 'on' read 'in.'

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF MINNESOTA.

JANUARY TERM, 1865.

IRA BIDWELL, et al., vs. JOHN R. MADISON.

I. B., J. R. M. and H. E. B., entered into a banking partnership under the style of Bidwell's Exchange Bank, subject to a stipulation by which J. R. M. was permitted to take a fixed salary in lieu of a share of the profits. J. R. M. elected to take and did take the salary. *Held*—that notwithstanding this election, I. B. and H. E. B. remained partners. Under the partnership articles, it was the duty of J. R. M. to take charge of all notes left with the concern for collection.

By the neglect of J. R. M. to make demand and give notice on a note left by F. & M. for collection, the endorser, who was the only solvent party to the note, was discharged. *Held*—that J. R. M. was liable to I. B. and H. E. B., as Bidwell's Exchange Bank, for the consequences of this neglect. At the time when the endorser was so discharged, the Bank held a note against F. & M. of a less amount than the note left by F. & M. for collection. F. & M. remained solvent for more than two years after the note of the Bank against them became due, but declined to pay the same on the ground that they had a larger claim against the Bank for the loss of the note by the negligence of M. *Held*—that the claim of F. & M. for damages was a proper counter-claim against the note of the Bank against them. The Bank made a settlement with F. & M. by sur-
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rendering the note against F. & M. and paying a certain amount of money, which was less than the difference between the note of F. & M. and the note held by the Bank against F. & M. *Held*—that the Bank was entitled to recover from J. R. M. the amount of the note surrendered and of the money paid.

The complaint in this action states that the Plaintiffs were co-partners engaged in a general banking and exchange business under the firm name and style of Bidwell's Exchange Bank, at St. Paul, during and prior to the month of May, 1856, to and until about the first day of May, 1858. That on or about the 21st day of April, 1856, the Plaintiffs and Defendant entered into an agreement in writing, by the provisions of which the parties thereto were to become co-partners in such business for one year, under said firm name, unless the Defendant should thereafter, or at the expiration of such co-partnership, elect to receive the sum of \$1,300 per annum as a salary, in lieu of a share of the profits of such business. That such copartnership should commence on the 16th day of April, 1856, and continue for one year, &c., &c. That the Plaintiffs under such agreement became copartners under said firm name, and commenced the banking and exchange business, and the Defendant became and was the Cashier of said Bank. At the expiration of one year, said agreement was extended for another year, and the Defendant continued to act as such Cashier. That Defendant elected to receive and did receive from the Plaintiffs the \$1,300 per annum as his salary for each of said years, according to the terms of said agreement, and that said Defendant of his own election never was a partner of said firm, but was the Cashier. That it was the custom of said Bank, in their usual course of business, to take and receive from their customers and others, notes, bills, drafts and other commercial paper for collection; and that the Defendant as such Cashier had the exclusive care and control of such collections, and undertook to take all the proper and actual means and legal steps and measures for collecting any and all such notes, &c., left with said Bank for that purpose, by making due presentment for and demand of payment of the same, and in case of non-payment to duly and legally notify the parties thereto, so as to fix their lia-

Bidwell et al. v. Madison.

bility thereon. That Fuller & Mendelson were the owners and holders of a promissory note of \$800, made by one Dunwell, dated the 10th day of July, 1856, and payable sixty days after date, with interest at the rate of three per cent. per month, and said note was endorsed by W. H. Randall and W. B. Brown. That said Fuller & Mendelson, on or about the 10th day of August, 1856, and before the maturity of said note, left the same with said Bank for collection. That said note was never duly presented for payment, or payment thereof duly demanded of the maker, and the same was never legally protested for non-payment, and notice of such presentment, demand of payment and non-payment and of such protest was never legally served upon said endorsers or either of them, and that said endorsers were wholly discharged and released from all liability to pay said note. That the said Dunwell (maker) and Randall (endorser) were at the time of the maturity of said note wholly insolvent, and the said note or any part thereof could not have been collected from them or either of them, or from the estate and property of said Randall, who has since died insolvent; but that the said endorser Brown was responsible, and the amount of said note could have been collected of him, or from his estate after his decease, except for the failure of said Defendant as such Cashier to take the legal steps necessary to charge him as such endorser. That in consequence of the failure to duly protest said note, the said Fuller & Mendelson sustained damage to the full amount thereof with interest, and that said Bank (the Plaintiffs) became and were liable to pay such amount, and did, on or about 0th day of June, 1860, pay the said Fuller & Mendelson the sum of \$627.75 in discharge of such liability; and that said Defendant is liable to pay and indebted to the Plaintiffs in the amount so paid by them with interest.

The answer denies the whole complaint, except the statements and allegations respecting the making of the note by Dunwell and the endorsement thereof by Randall and Brown, and the ownership of the same by Fuller & Mendelson, and alleges as new matter, "that after the aforesaid note had matured, and after the same had been protested for non-payment, and after the said pro-

test had been notified to the said W. B. Brown as endorser of said note, he, the said W. B. Brown, did, with full knowledge of the said default in the payment of said note, and of the said protest of said note, and of all the facts and circumstances attending the same, and without objection pay to the said Fuller & Mendelson, the owners and holders of said note, the sum of \$300 on account of the principal and interest then due and owing upon said note."

The reply denies the new matter set up in the answer. The cause was tried before a Referee, and in his decision the facts are found substantially as alleged in the complaint, except upon the question of a copartnership between the Plaintiffs; and upon this question the Referee sets out in his finding of facts the whole agreement entered into between the parties, dated the 21st day of April, 1856, which agreement (among other provisions) contains the following, to-wit: "Memorandum of agreement made and entered into this 21st day of April, A. D. 1856, between Ira Bidwell, of Adrian, Michigan, of the first part, and John R. Madison, late of Buffalo, N. Y., and Henry E. Bidwell, of Adrian, Michigan, of the second part: The parties above named have agreed to become partners, and by these presents do become partners, in the exchange and banking business, to be conducted and carried on at St. Paul, Minn., under the name of Bidwell's Exchange Bank—the firm consisting of Ira Bidwell & Son, Bankers, and John R. Madison, Cashier. * * * * *

"And it is further agreed between the said parties, that the said John R. Madison, one of the parties of the second part, may, at the expiration of this agreement, viz., on the 16th day of April, A. D. 1857, elect to receive the sum of \$1,300 in cash as a salary, in lieu of one-third of the net proceeds of the said exchange and banking business," &c. The Referee finds that a payment of \$300 was made upon the note of \$800 to Fuller & Mendelson, but says "that there is no evidence to prove when, or under what circumstances, or by what party to said note the same was paid."

The Referee further finds that the Plaintiffs (said Bank) held a note, made by Fuller & Mendelson, of \$406, and that when the

same matured they refused to pay the same (although solvent) on the ground that the said Bank was liable to them on account of the failure to protest the note made by Dunwell. That the Plaintiffs made a settlement in June, 1860, with said Fuller & Mendelson, by surrendering to them their note of \$406, and paying them the balance due upon the note of \$800, which was the sum of \$63 in cash. That the note so surrendered, with interest to the day of settlement, amounted to the sum of \$482.

As conclusions of law the Referee finds that the Defendant is liable to the Plaintiffs for the amount actually paid by them to Fuller & Mendelson, in June, 1860, with interest from the time of such payment to the date of his report, amounting to the sum of \$682.30. Judgment was rendered in favor of Plaintiffs against said Defendant for said sum.

Defendant sued out writ of error.

LORENZO ALLIS, for Plaintiff in Error.

MORRIS LAMPREY, for Defendant in Error.

I.—The report of a referee cannot be reviewed on error or appeal unless exceptions are properly taken during the trial of the cause, or to the final decision, and a case or bill of exceptions made; the whole theory of practice in courts of review is founded upon exceptions properly taken below; and in reviewing the report of a referee this Court should not examine questions which were not raised below. 12 *How. Prac.* 418; *Id.* 481; *Id.* 567; *Id.* 571; *Hurd vs. Bloomer*, 3 *Kernan*, 341; *Id.* 344; 4 *Selden*, 204, and cases cited; 14 *New York*, 435; 16 *New York* 610; *District Court Rules*, No. 39; *Comp. Stat.*, sec. 54, p. 564, and sec. 66. p. 565.

But the Supreme Court has held, that "upon error from a judgment rendered upon the report of a referee, where no exceptions are taken upon the trial, or to the finding, and the evidence is not reported, the only question which this Court can consider is whether the facts found sustain the conclusions of law. 8 *Minn.*, 154; *Id.*, 226; 3 *Minn.*, 45.

II.—The report of the referee in this cause finds upon all the facts in issue: "The general conclusion of the referee is to be construed as involving a finding upon all the material questions, though such a finding be not expressed in terms." Only material issues need be considered. But if the report were defective in this respect, the only proper remedy is to apply to the District Court for an order sending the report back to the referee for correction. *Grant vs. Morse*, 22 *New York*, 328; 3 *Minn.*, 311; 2 *Minn.*, 134; 3 *Minn.*, 45.

Upon review this Court will presume nothing in favor of the party alleging error, but if compelled by the imperfection of a referee's report, or the statement of facts, to resort to presumptions, will adopt such only as will sustain the judgment." *Connan vs. Putts*, 21 *New York*, 547.

There is no finding or presumption in this case that Brown, the indorser, ever made any payment on the note of Dunwell, with notice or without notice of the neglect of protest.

III.—Every instrument is to be construed with reference to its object, and all of its terms and the whole context must be considered in arriving at the intention of the parties. 9 *Minn.*, 119.

Madison by his own election, which must be referred back to the date of the agreement, never was a partner in Bidwell's Exchange Bank, "but the firm consisted, as between themselves, of Ira Bidwell & Son, Bankers, with Madison as Cashier," the relation of the parties, and not the firm name, is the material question. 5 *Minn.*, 486.

A mere instrument in writing cannot constitute a copartnership, unless something is done under it; it is the acts and doings of the parties that determine their rights and liabilities. Madison having elected to receive and received his annual salary of \$1,300 as Cashier, *inter se*, never had any right to an account, or to any share in the profits if there had been any. *Parsons on Con.*, 133, 135, 136, and note; 6 *Met.*, 82; 13 *Barb.*, 302; 16 *Barb.*, 309; 12 *Cow.*, 69; 1 *Denio*, 337; 3 *Cow.*, 132; 20 *Wend.*, 70; 4 *Sandf.*, 311; 13 *Gray*, 468; 5 *Gray*, 58; *Parsons' Merc. Law*,

168, *and note*; 10 *Met.*, 303; 24 *Ill.*, 483; 24 *Howard's U. S. C.*, 536.

IV.—It is wholly immaterial in this case whether Madison was a partner or not, and can in no way effect his liability. The same diligence, care and skill are required of each partner as of agents, and an agent is bound to possess and use all the knowledge, skill, care and diligence that prudent men employ about the like business, and that are necessary for the proper performance of the duties which he undertakes. Says Lord Loughborough, in *1st H. Bl.* 151: "If a man be in a situation or profession to imply skill, an omission of that skill is imputable to him as gross negligence." *Story on Partnership*, secs. 169, 170, 171, 173; *Story's Agency*, secs. 182, 183, *et seq.*; *Dunlap's Paley's Agency*, 71 to 73; 3 *Story's C. C. Rep.*, 106; 1 *Cow.*, 645; 1 *John. Cases*, 179; 20 *Pick.*, 167; 1 *Parsons' Contr.*, 73, 74, *and note*.

V.—The Plaintiffs below, by reason of the gross neglect of their Cashier, had been virtually subrogated for W. B. Brown as indorser on the note; by consequence the note remained perfectly good for the amount of it. It was owned by Fuller & Mendelson, and they agreed to pay and did pay their note to the Bank in such note, on which the Bank was practically indorser, receiving the balance in money. Of course one note was a counter-claim to the other. How then can a note which was actually paid in for funds and in money in full be called worthless? *Borup et al. vs Ninninger*, 5 *Minn.*, 549.

VI.—The answer admits the amount of damages alleged to have been incurred and actually paid by the Plaintiffs in the complaint, since a general denial of the allegation of the sum paid as damages, like a general denial of value, is wholly insufficient, being merely a negative pregnant and bad in pleading. *Lynd vs. Pickett*, 7 *Minn.*, 194; *Dean vs. Leonard*, *Jan. Term*, 1865.

By the Court—BERRY, J.—It is not necessary to determine in this case what were the relations of the parties to this action to third persons, so that we are not embarrassed by any of the difficulties which might present themselves were we considering the ques-

tion of partnership or no partnership in reference to outsiders. We have only to decide upon the mutual rights and liabilities of the parties to this action as between themselves. The Defendants in error allege in their complaint that they were partners under the style of Bidwell's Exchange Bank. This allegation is denied by the answer. The Plaintiff in error contends that a material issue was therefore raised upon the question of partnership between the Bidwells, and that the Referee has not found the existence of the partnership, and so the Defendants in error have failed to establish a material allegation in their case. The Referee finds that the Plaintiff and Defendants associated themselves in business under a written agreement, set out verbatim in the report, and entered into between Ira Bidwell, of the first part, and John R. Madison and Henry E. Bidwell, of the second part, by which the parties became partners for one year, profits and losses to be equally divided. That they entered upon and carried on business under said agreement, and the renewal of it, for the space of two years, when Madison withdrew, and the business was continued by the Bidwells. There can be no doubt but this state of facts would constitute a partnership between the parties. But the partnership articles contained the following stipulation: "And it is further agreed between the said parties, that the said John R. Madison, one of the parties of the second part, may at the expiration of this agreement, viz., on the 16th day of April, 1857, elect to receive the sum of thirteen hundred dollars in cash as a salary, in lieu of one-third of the net proceeds of the said exchange and banking business," &c. The Referee further finds that Madison elected to receive and did receive the sum of thirteen hundred dollars in pursuance of this stipulation at the expiration of the year, and also at the expiration of the second year. At this stage of the case the question to be considered is, what relation did the Bidwells sustain to each other upon the exercise by Madison of his right to receive a salary in lieu of one-third of the net proceeds of the business? To be sure, the Referee finds that the losses exceeded the profits, but we do not perceive that that fact is important. We think the fair construction of this state of

facts is, that the Bidwells and Madison associated themselves together as partners with a special stipulation that Madison might at his own option, at a specified time, elect to be a partner or a salaried employee, and that when Madison elected to be a salaried employee the partnership relation between the Bidwells was not disturbed. They were partners before the election, and that election, provided for as it was in the original partnership articles, left them still partners as it found them. This fact is sufficiently found by the Referee. (*Cady vs. Allen*, 18 N. Y., 572.) The next inquiry would seem to be as to the relation between the Bidwells and Madison, and of course their mutual rights and liabilities. On this head we have already somewhat anticipated.

By the terms of the agreement it would appear that it rested with Madison himself to say whether he was a partner or an employee. He elected to be considered as the latter, and we see no reason why his election should not be decisive upon the question of his capacity and the nature and extent of his liability. By this election he relieved himself from the duty of contributing to make up the losses of the partnership business, and it would be inequitable for him to shield himself from the liabilities which would attach to a capacity which he had assumed of his own voluntary choice. No doubt was expressed upon the argument as to the duty of Madison (who took charge of the note made by Dunwell) to have made a demand of payment upon Dunwell as early as the day of maturity, nor as to the fact that his neglect so to do discharged the endorser Brown, who was the only solvent and responsible party to the note. And we see no reason why Madison was not liable over to his employers, the Bidwells, for any damage arising from negligence of this character. As to the endorsement of \$300 made upon the note by Fuller & Mendelson, the owners of the note, there would appear to be no basis for the presumption contended for by the Plaintiff in error, that that sum was paid by Brown, and the Referee finds that there is no evidence upon the subject. On the question of damages, we find nothing wrong in the amount awarded by the Referee. The firm styled Bidwell's Exchange Bank was clearly liable to Fuller & Mendelson for the

vol. x.—4

neglect by which the Dunwell note was lost, and Fuller & Mendelson had an undoubted right to exact the full amount due on the note as damages. Fuller & Mendelson were the owners of this claim for damages against the Bank, and the Bank held Fuller & Mendelson's paper for a smaller amount. At the maturity of this paper, and at the time when the claim for damages accrued, and for two years afterwards, Fuller & Mendelson were solvent, but declined to pay the note which the Bank held against them on the ground that they were entitled to the damages aforesaid. It does not appear that Fuller & Mendelson were insolvent at the time of the agreement of settlement between them and the Bank, and it is perhaps unimportant whether they were or not. The claim of Fuller & Mendelson against the Bank for damages, was a proper matter of set off against the note held by the Bank. It was a claim for damages arising from the non-fulfilment of a contract to make the demand and give the notice necessary to fix the liability of an endorser. An action of assumpsit might have been maintained at common law in such case, for as Chitty says: "The breach of all simple contracts * * * for the performance of any act is remediable by action of assumpsit." (1 *Ch. Pl.* 100.) "Assumpsit is the usual remedy for neglect or breach of duty against bailees." (*Ibid* 134.) See also 6 *Minn.* 352. The Bank might well forbear to enforce collection of the note against Fuller & Mendelson, so long as Fuller & Mendelson held a claim against the Bank sufficiently large to swallow its note up. We think the referee was right in awarding the amount of damages found in his report, being the amount paid by the Bank in settlement of Fuller & Mendelson's claim, especially as this amount (according to our computation,) was less than the claim, and so an abatement had been secured in the advantage of Madison. We also think that under all the circumstances of the case, the referee was right in regarding the note against Fuller & Mendelson, which was surrendered on the settlement as so much cash. The counsel for the plaintiff in error insists that inasmuch as Madison was allowed to receive his salary of \$1300, after this act of negligence by which the Bank became liable, and without any claim being made upon

McRoberts v. Washburne et al.

him on account of the negligence, he had a right to take it for granted that the Bidwells had assumed this liability to themselves, and that he was clear from it. If the defendants in error saw fit to pay Madison his salary and hold him for damages for his neglect, they had a right so to do, and the fact that nothing was said about the claim for negligence at the time when he received his salary, would only go to show that the matter was not then adjusted.

The judgment below is affirmed.

THOMAS McROBERTS, vs. W. D. WASHBURNE et al.

Chapter 104 of the special laws of 1858, page 303, is not repugnant to sec. 2 of article 10 of the Constitution of this State.

Section 2 of said chapter operated as a repeal of the first proviso of section 7 of chapter 71, page 269 of the session laws of 1857. The mere fact of riparian ownership does not authorize a riparian owner to run a public ferry to and from his own shore. The establishment and regulation of ferries is a subject under the control of the Legislature. A ferry franchise is property. A grant of a ferry franchise by the Legislature is a contract within the meaning of that provision of the Constitution prohibiting the passage of laws impairing the obligation of contracts.

Chapter 63 of the special laws of 1862, page 324, is unconstitutional. Invasions of a ferry franchise may be restrained by injunction.

This action was commenced in the Houston County District Court. The Plaintiff in his complaint alleges a grant to him from the Legislature of the exclusive right to establish and maintain a ferry across the Mississippi River within certain limits; his compliance with the terms and conditions of the grant, and that Defendants have infringed upon his rights under said grant by establishing another ferry within such limits. The Plaintiff upon

his complaint applied to the Judge of said District Court for an order for a temporary injunction, which application was resisted by Defendants, who at the hearing read the affidavit of W. D. Washburne, one of the Defendants. The Judge granted the order and the Defendants appeal therefrom to this Court. A sufficient statement of the case appears in the opinion of the Court.

H. R. BIGELOW, for Appellants.

HUGH CAMERON, for Respondent.

By the Court—BERRY, J.—By an act of the Territorial Legislature, approved Feb. 7th, 1857, it is provided "that Thomas McRoberts, his heirs, executors, administrators or assigns shall have the exclusive right and privilege of keeping and maintaining a ferry across the Mississippi River, at a point near the Mississippi Avenue in the village of La Crescent, for the period of fifteen years, and no ferry shall be established within one mile and a half below or above said point." *Laws* 1857, 268-9. Sections 2, 3, 4, 5, 6, are not here important. Section 7 read in this wise: "Nothing herein contained shall be construed to contravene the provisions of any other act, except that the said Thomas McRoberts shall have the exclusive right of ferriage within the distance of one mile and a half above and below the center of the said Mississippi Avenue. *Provided*, The right hereby granted shall not extend beyond the land now owned by said McRoberts and his associates. *And provided further*, That nothing contained in this act shall be construed as to affect the rights and privileges granted to the Winona and La Crosse Railroad Company, approved February 25th, 1856." By an act of the State Legislature, approved July 23d, 1858, (see *Laws* 1858, *page* 303,) the territorial limits within which McRoberts was authorized to exercise his ferriage rights, were considerably enlarged, and it was provided that no ferry should be established within one mile and a half above or below the enlarged limits. McRoberts alleges in his complaint that in 1857, he established a ferry as he was authorized

to do by law, and has ever since maintained the same in accordance with the provisions of the original act of 1857, and the amendatory act of 1858; that in so doing he has incurred large expense, &c., and that Washburne and his co-Defendants have infringed upon his exclusive right of ferriage, by establishing and running a rival ferry within the territory added by the act of 1858 to his original limits, as defined in the act of 1857. The complaint also contains a statement of the damages resulting from this alleged invasion of his rights. And here the Appellants' counsel interpose the objection that the act of 1858 is in conflict with Section 2 of Article 10 of the Constitution, by which it is declared that "no corporation shall be formed under special acts except for municipal purposes." Now, without stopping to consider whether any or how extensive an enlargement of the franchises of a corporation already in existence is prohibited by this provision of the Constitution, it would evidently be necessary in order to bring the act of 1858 within the letter or spirit of the prohibition, to show that Thomas McRoberts was endowed with corporate powers. There is not a word in either of the acts referred to, conferring upon him a single distinctive attribute of a corporation. See *Angell & Ames on Corp., sec. 1-10 inclusive, 1 Bl. Com., 475*. Section 1, Art. 10 of the Constitution itself settles the question as follows: "The term 'corporation' as used in this article, shall be construed to include all associations and joint stock companies having any of the powers and privileges not possessed by individuals or partnerships, except such as embrace banking privileges," &c. It can hardly be contended that Thomas McRoberts answers to this definition. The act of 1857 simply granted a franchise to "Thomas McRoberts, his heirs, executors, administrators or assigns," and no more constituted him a corporation, than would the County Commissioners, had they endowed him with similar privileges by granting him a ferry license. Nor does the fact that the franchise came directly from the State, make the person upon whom it is conferred a corporation, any more than a conveyance of school land by the State, makes the grantee a corporation. The counsel for the Appellants further

contend that by the terms of Section seven, of the act of 1857, it was expressly enacted "that the right hereby granted shall not extend beyond the lands now owned by said McRoberts and his associates," and that for this reason the complaint is defective in not stating that the ferry of the Appellants is established and run upon or within a mile and a half above or below any lands owned by McRoberts and his associates, and mentioned in the acts of 1857 and 1858. If it be true that McRoberts is confined in the exercise of his right of ferriage to lands owned as above, this objection might appear to be well taken. On the other hand it is claimed by the Respondent that he was exonerated from this condition by section 2, of the act of 1858. By the first section of that act he is endowed with the exclusive and unrestricted privilege of establishing and maintaining a ferry within certain limits therein designated, and section 2 provides "That section seven (which we have quoted at length,) in said act (referring to the act of 1857,) be and is hereby amended so as to contravene and repeal all acts conflicting with section one in this amendatory act, except so much of section seven as relates to the rights of the Winona and La Crosse Railroad Company." There can be no doubt that a restriction by which an otherwise unrestricted grant is made less is in conflict with that grant. And we have no hesitation in saying that section two of the act of 1858, operated as a repeal of that part of the act of 1857, which confined McRoberts in the exercise of his ferry franchise to the lands owned by himself and his associates. We think a very forcible argument in favor of this construction might be drawn from the circumstance that in the same section two, the Legislature has excepted the rights of the Winona and La Crosse Railroad Company from the repeal. As by the act of 1857, these rights were excepted by a proviso immediately following the proviso limiting McRoberts' ferry franchise to the land of himself and associates, and in the same section there would seem to be no doubt that it was the intention of the Legislature to repeal all other restrictions and limitations as to the territory in which the franchise could be exercised. No reason can be given why one proviso should be excepted from the repeal and not the

other, unless it was the intention to repeal the latter and leave the former in operation.

No question is made upon the right of a State in the exercise of its police powers, to grant the franchise of a ferry upon the Mississippi River, according to the doctrines enunciated in *Conway vs. Taylor's Executors*, 1 *Black.*, 634. But the Appellants insist "that the riparian owner at any point on the river has a right to and from his own shore and bank to operate a ferry or any other boat upon the river, and that the Legislature of Minnesota cannot take away that right," and that therefore the complaint is insufficient because it fails to state "that the ferry boat of the Appellants is operated to and from land not their own." No authorities are cited in support of this position. All the books speak and treat of the right to run a ferry boat for public accommodation and to charge tolls, as a franchise. In *Mills vs. St. Clair Co.*, 8 *How. U. S.*, 581, the Court say that they deem the general principle not open to controversy "that the establishment and regulation of ferries is a subject within the control of the government and not matter of private right, and that the government may exercise its powers by contracting with individuals." (2 *Black. Com.*, 38; *Id.*, 236; 15 *Pick. R.*, 249.) Kent defines franchises to be certain privileges conferred by grant from government and vested in individuals. (2 *Kent's Com.*, 458. See also 1 *Black.*, 634 *supra*; 2 *Washburn, R. P.*, 20.) And ferries which by the common law were regarded as "*publici juris*," and not to be established except on special authority from the crown, have in many if not all the States of the Union, been subjected to the control of the Legislature, which has not hesitated by special as well as general enactments, to regulate them as matters of public police, and to confer upon individuals as well as corporations, exclusive rights of ferriage within certain limits, and in no case, so far as we have been able to discover, has the fact that a third party was the owner of a part of the shore within those designated limits, justified him in establishing a rival ferry therein. (2 *Washburn R. P.*, 19, 20, 21.) As Justice Swayne says in *Conway vs. Taylor's Executors*, "The vitality of such a franchise

lies in its exclusiveness. The moment the right becomes common the franchise ceases to exist." In 1862 an act was passed by the Legislature repealing the act of 1858, which we have cited. It is claimed by the counsel for the Respondent that this act was unconstitutional, as impairing the obligations of a contract. We think the point well taken. It is to be noticed that the Legislature reserved no right of alteration or repeal in the act of 1858. The doctrine seems to be that in a proper case, in the exercise of its right of eminent domain, the State may condemn a franchise equally with any other species of property, making compensation therefor. (2 *Wash. R. P.*, 23; *Brunson vs. Mayor of New York*, 10 *Barb.*, S. C. R., 245. But that is not this case. As Kent says, (3 *Com.*, 458,) grants of franchises "contain an implied covenant on the part of the government not to invade the rights vested. * * * The government cannot resume them at pleasure nor do any act to impair the grant without a breach of contract. * * * An estate in such a franchise and an estate in land rest upon the same principle." And Justice Swayne in the same opinion from which we have quoted above, says that "a ferry franchise is as much property as a rent or any other incorporeal hereditament or chattel or realty. It is clothed with the same sanctity and entitled to the same protection as other property." Sedgwick on *page* 625, *Stat. and Con. Law*, says that such grants are regarded "as contracts within the meaning of the constitution." (See also *Brunson vs. Mayor of New York*, 10 *Barb.*, 224.) It appears from the stipulation of the parties, which forms a part of the case, that on the hearing of the motion for the preliminary injunction which was granted below, the Appellants made use of an affidavit of W. D. Washburne, one of the Appellants, in opposition to the motion. The affidavit itself is not before us, but it is stipulated that "the Defendants also read in evidence an affidavit of Defendant W. D. Washburne, stating upon his information and belief, that the Target Lake Plank Road and Ferry Company became an organized company under said act of 1856 incorporating said company, and that the acts charged in the complaint as having been done by Defendants, were done by him under said

company, and with their consent and authority, and that the places where they were committed were within the territorial limits covered by the Target Lake Plank Road and Ferry Company, and outside the limits covered by the first act granting a ferry franchise to said McRoberts."

It is to be observed that all these statements are made upon information and belief. This affidavit was objected to as incompetent "to prove the organization of the Company or the rights and privileges claimed by the Defendants." Granting that the act of incorporation of the company, as is contended by the Appellants, *organized* the company, it would still be incumbent on the Appellants to connect themselves with the company by some proper averments, and this is done, as we have seen, only upon information and belief, which we think plainly insufficient when objected to as it was in this case. The Appellants insist that the affidavit was as good as the complaint, which is verified in the usual form. In the first place an inspection of the complaint will show that all of its averments are in form positive, and there are authorities in New York holding that where such is the case a verification in the usual form satisfies the requirements of the statute in regard to applications for injunctions. See *Woodruff vs. Fisher*, 17 Barb. S. C., 229; *Smith vs. Reno*, 6 How. Pr., 124; *Miner vs. Terry*, Id., 208; *Crocker vs. Baker*, 3 Abb. Pr., 183; *Levy vs. Lay*, 6 Abb. Pr., 89; *Kinkaid and Wife vs. Kipp & Brown*, 1 Duer, 693; *Ross vs. Longmuir*, 15 Abb. Pr., 326. In the second place, the injunction in this case was not granted *ex parte*, but on a hearing of all parties, and no objection seems to have been taken to the manner in which the complaint was verified. See *Campbell vs. Morrison*, 7 Paige, 160. Nor does it appear that any of the averments contained in the complaint were denied by the affidavit. We think this a proper case for the allowance of an injunction. Kent says, "It (speaking of the common law) declared all such invasions of franchises to be nuisances, and the party aggrieved had his remedy at law by an action on the case for the disturbance, and in modern practice he usually resorts to chancery to stay the injurious interference by

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injunction." 3 *Kent's Com.*, 459; 2 *St. Eq. Juris.*, 927; 9 *Johns.*, 587; 1 *Johns. Ch.* 615; 5 *Johns. Ch.* 110; 10 *Barb. S. C.*, 235; 2 *Wash. R. P.*, 21. It is to be remembered, and that seems to be the principle, in part at least, upon which the authorities last cited rest, that a party is entitled to an injunction where he would otherwise be driven to institute a multiplicity of suits to obtain redress, as it is plain he would be in this case, for repeated acts of infringement upon his rights.

The order allowing the temporary injunction is affirmed.

***ALEXANDER FARIBAULT and NICOLAS LA CROIX, vs. LUKE HULETT and H. M. MATTESON.**

A certiorari lies to review the action of the District Court, dismissing a proceeding authorized by *chapter 129 of the public statutes*, providing for the erection of mill dams and mills in certain cases.

If the facts stated in the petition in such proceeding are such as bring the case within the first section of the chapter of the statutes referred to, the jurisdiction of the Court is complete, although the right to the relief sought may depend on other circumstances.

If there be an exception in the enacting clause of a statute, it must be negatived in pleading, but a proviso need not.

The petition fully describes the several pieces of land which may be injured by erection of the proposed dam, and states the respective owners thereof who are other persons than the petitioners. *Held*—that this shows sufficiently that the petitioners are not the owners of the land which will be injured.

When an injury is alleged to persons or property, the law presumes *prima facie* want of consent to the injury; it need not, therefore, be expressly alleged in the first instance.

*Mr. Justice Berry, being of counsel in this cause, took no part in its hearing or determination.

This is a motion to the Supreme Court by Faribault and La Croix, for a writ of certiorari to be issued to the District Court of Rice county. The motion papers show that heretofore Faribault and La Croix presented a petition duly verified, to the Judge of said District Court, stating therein that they are the owners of certain described real estate in said county; that the Cannon River, which is not a navigable stream, runs over and across a portion of said premises; that the petitioners have expended large sums of money, &c., for the purpose of enabling them to improve a valuable water power on said premises, and have made arrangements to commence a saw and grist mill thereon, and have commenced the work of improving said water power; that they are desirous of erecting and maintaining a mill dam upon their said lands, in and across said Cannon River, at a point designated in said petition, for the purpose of raising the water of said river, that the same may be used in running such saw and grist mill; that it will be necessary to raise said dam nine feet above the bed of the river, and that in consequence of raising such dam, certain lands described in said petition belonging to the several persons therein named (other than the petitioners) may be overflowed, &c. The petitioners pray for the appointment of three disinterested residents of said county, as commissioners to inquire touching the matters contained in the petition, and to assess the damages which will result to any person from the erection of said mill dam, and its maintenance forever. Commissioners were duly appointed by an order of said Court, and took all the necessary and legal steps required by law and by said order in the discharge of their duties, and their report of their doings, signed by a majority of such commissioners, was duly filed, and notice of such filing duly given pursuant to law. Hulett and Matteson, who had appeared before the commissioners in person and by attorney in the matter of the petition, were notified of the filing of such report, and within thirty days after such notice they appealed to the District Court of said Rice county, from the assessment of said commissioners. The appeal was brought to a hearing at a general term of the Court, and after a jury was empanelled and the jury fee paid, a

motion was made on the part of Hulett and Matteson to dismiss the cause upon certain specified grounds; which motion was granted upon the grounds stated, and an order dismissing the cause duly entered; to which order and ruling the petitioners duly excepted.

The petitioners pray that a writ of certiorari may issue to said District Court, that the record of said proceedings be certified to the Supreme Court, that the order dismissing the cause may be annulled, set aside and reversed, assigning for error in said order—

1. That said District Court had no jurisdiction and authority on said appeal to make said order.

2. That said petition and the proceedings thereon were in all respects regular and sufficient in law.

3. That it appears from the record that if any defects exist in said petition or proceedings they have been waived by said Appellants (Hulett and Matteson).

COLE & CASE, for Petitioners.

I.—An appeal does not lie from the order sought to be reversed.
1 *Kern.*, 276; 17 *Pick.*, 58.

Nor a writ of error. 10 *Wend.*, 350; 13 *Cow.*, 110; 3 *Crush.*, 11.

II.—A mandamus to compel the Court to proceed with the assessment will not lie, because none but ministerial acts can be reviewed in that manner. 18 *Wend.*, 97; 20 *Wend.*, 638.

III.—Certiorari lies upon all final adjudications of an inferior Court or officer invested by the Legislature with power to decide upon the property or rights of the citizen, and which Court or officer acts in a summary way or in a new course different from the common law, and upon a return to such writ jurisdictional question or questions which relate to the regularity of the proceedings or questions of law which arise upon the face of the records, or of the proceedings or orders which are of the nature of records, may be examined. 25 *Wend.*, 167-169; 6 *How. Pr.*

R., 25; 15 *Pick.*, 234; 11 *Mass.*, 464; 6 *Mass.*, 397; 17 *Pick.*, 58; 13 *Ill.*, 660.

IV.—Should it be objected that the District Courts of this State are not inferior Courts, but Courts of general common law jurisdiction, we answer, that it is admitted that these Courts are not, while exercising their general common law powers, inferior Courts, but it is equally certain that while exercising a special statutory jurisdiction they are inferior tribunals, and subject to supervision of the Supreme Court as such. 17 *Barb.*, 232; *Id.*, 506; 7 *Hill*, 9; *Mass. R. S.*, (1836) p. 508; 8 *Pick.*, 194; 7 *Met.*, 605; 17 *Pick.*, 58; 8 *Wend.*, 47.

The rule is accurately stated as follows: When any error has occurred in the proceedings of the Court below, while proceeding differently from the course of the common law, in any stage of the cause, either in civil or criminal cases, the writ of certiorari is the only remedy to correct such error, unless some other statutory remedy has been given. *Bouvier's Law Dic.*, Vol. 1, Title *Certiorari*; 8 *Pick.*, 227.

V.—On certiorari the Court may reverse the proceedings in part, if divisible in their nature. 13 *Pick.*, 195.

VI.—The jurisdiction and duties of the District Court, on appeal from the commissioners, are carefully limited and defined, viz., to cause the damages to be assessed, and any other action or decision of the Court was without authority and void. *Section 13, p. 848 Comp. Stat.*

This Court on appeal has only authority to pass upon the merits. If the commissioners erred in matters of law, or exceeded their jurisdiction, the remedy was by certiorari directly therein and not under appeal under the statute. 13 *Wend.*, 432; 14 *Wis.*, 266; 2 *Hill*, 14; 7 *How.*, 164; 15 *Barb.*, 37; 17 *Barb.*, 232; 6 *Wis.*, 291; 13 *Wis.*, 634; 3 *Cush.*, 78–80.

VII.—All the commissioners being present at the hearing, it was competent for a majority to unite in the report. *Sec. 41, p. 630, and Sub. 3, Sec. 1, p. 114, Comp. Stat.*; 1 *Hill*, 200; 2 *Kern.*, 197; 3 *Denio*, 252.

VIII.—*a.* The fact that the commissioners were disinterested

residents of the county, need not affirmatively appear; it will be presumed until the contrary is shown. 4 *Cow.*, 194; 7 *Conn.*, 362; 3 *Conn.*, 406.

b. It does sufficiently appear, however, from the fact that the petition requests the appointment of three disinterested residents of the county. The order reciting a portion of the petition purports to be granted in accordance with the prayer of the petition. 7 *Conn.*, 358, *note*.

IX.—The statute prescribes what the petition shall contain and has been strictly followed. *Secs. 1, 2 and 3, Chap. 127, p. 847 Comp. Stat.*

X.—It could not be necessary to negative in the petition the existence of a water power previously improved. That this was a matter of defence to be shown before the commissioners, is apparent from the fact that the liability to injury of such power could only be ascertained by an examination and the taking of levels and measurements, and would be first discovered by the inquiry of the commissioners under their appointment.

XI.—It is a fundamental rule, applicable alike to pleadings and criminal actions, and to special proceedings like the present, that if there be an exception in the enacting clause the party pleading must show that his adversary is not within the exception; but if there be an exception in a subsequent clause, that is matter of defence, and is to be shown by the other party. 11 *Cush.*, 130; *Id.*, 178; *Gould's Pl., chap. 4, secs. 20-1-2*; 12 *Barb.*, 347; 2 *Hill*, 443; 6 *Barb.*, 607; 20 *Wend.*, 360.

XII.—It may be claimed that it should appear on the face of the petition that the Respondents' lands were not "damaged by consent." The fact of applying for commissioners, is as conclusive evidence of want of consent as any language could afford. 1 *Conn.*, 279; 19 *Conn.*, 519; 10 *Conn.*, 306; 7 *Cowen*, 353.

BATCHELDER & BUCKHAM, and BERRY & PERKINS, for Respondents.

I.—The writ of certiorari can be allowed only upon its being

made to appear by all the affidavits presented by the applicants and Respondents, that error was committed by the Court below in making the order complained of. 1 *Monell's Prac.* 267 and 268.

II.—The act being a special statute in derogation of the common law, the applicant must bring himself strictly and fully within its provisions, or the Court will not acquire jurisdiction. He must not only make affirmative averments of all the circumstances necessary to bring the matters within the statute, but if there be exceptions in the act which confers the right, he must show negatively that the matters are not within the exceptions.

III.—The petition of the applicants is substantially and utterly defective, and confers no jurisdiction or authority upon the Judge to make the order appointing the Commissioners, because—

1. It does not set forth that the granting of the right applied for would not operate "to the injury of a water power previously improved."

2. It does not set forth the granting of the right would not "impair the right of any person to erect and maintain a dam under the laws heretofore and now existing."

3. It does not state that the real estate sought to be overflowed and damaged, is not owned by them, (the petitioners,) nor "damaged by consent." The allegation of all these facts in the petition is indispensable to the granting of the application, and the making of the order to appoint commissioners. *See act Comp. Stat.* 847, sec. 1, 16, 25.

The petition does not follow either of these sections.

IV.—All the facts which are alleged in the petition may be true, and yet the applicants not entitled to the privilege of erecting a mill dam under this act.

V.—Section 2 of said act does not profess to define all the averments or allegations which must be set forth in the petition. A petition drawn in pursuance of said section 2, with no further allegation, would be entirely insufficient. *Act Comp. Stat.* 847, sec. 2.

VI.—The burden of alleging and proving that this is not a case which comes within the exceptions mentioned in the 1st, 16th and 25th sections of the act rests upon the applicants, because—

1. The facts are equally within the knowledge of the applicants, and are susceptible of easy proof on their part. 24 *Pick.* 347.

2. The Respondents have no opportunity of putting in an answer or making up an issue, showing on their part that the case is embraced within the exceptions, and no way of litigating those facts before the commissioners or the Court.

VII.—If the Respondents must set it up, and treat it as matter of defence, that the case is within the exceptions, where and at what stage of the proceedings can it be done?

The commissioners cannot take those facts into consideration, neither can the Court on appeal, for by the terms of the statute, the appeal only brings before the Court the propriety of the "amount of damages reported by the commissioners." See *act Comp. Stat.* 847, sec. 13.

VIII.—The objections raised to the petition are on the ground of substantial defects affecting the jurisdiction, and for want of indispensable allegations, and not for irregularities merely; and the defects could not be waived or cured by the appearance of the Respondents.

And it appears by the affidavits that the Respondents made no general appearance, but appeared specially under protest, waiving no rights, and objecting to the jurisdiction and authority of the commissioners, and again to the jurisdiction of the Court on appeal.

By the Court—McMILLAN, J.—This is an application by Alex. Faribault and Nicolas La Croix for a writ of certiorari to the District Court for the county of Rice, to review the action of that Court in the course of certain proceedings therein under *Chapter 129 of the Public Statutes*, providing for the erection of mill dams and mills in certain cases.

The proceedings in the Court below were dismissed by that tribunal. The grounds upon which this action is based, and upon which the Defendants rely in opposition to granting the writ of certiorari, are:

1. The petition fails to state that the erection and maintaining

of their proposed dam will not cause the injury of a water power previously improved.

2. The petition fails to state that the erection and maintenance of said dam will not destroy or impair the right of any person to erect and maintain a dam under the law existing at and before the passage of the law under which the petitioners proceed.

3. The petition does not state that the real estate sought to be overflowed and damaged is not owned by the petitioners nor damaged by consent.

There is no statutory provision for an appeal in a proceeding of this character, and it is one unknown to the common law. In such case, it has heretofore been determined by this Court, a certiorari lies. *Tierney vs. Dodge*, 9 Minn., 166. We do not understand, however, that the Respondents deny this position.

So far as the question of the constitutionality of the law under which the proceedings originated and were conducted is concerned, although, perhaps, legitimate on a motion of this kind and suggestive in the briefs of the parties, it was not discussed at the bar, and it was distinctly understood that while for the purpose of this application the constitutionality of the law might be assumed, no final adjudication upon that point could be made at this time, but that question would be reserved for determination when it should arise at a subsequent stage of the case. We proceed, therefore, to the objections which go to the sufficiency of the petition.

The first and second sections of the act are as follows :

"Sec. 1. When any person may be desirous of erecting and maintaining a mill dam upon his own land across any water course not navigable, and shall deem it necessary to raise the water by means of such dam, or occupy ground for mill yard so as to damage, by overflowing or otherwise, real estate not owned by him, nor damaged by consent, he may obtain right to erect and maintain said dam by proceeding as in this act provided.

"Sec. 2. He shall present to the Judge of any Court of record in which jury trials are had in the county, or if there be no such court in the county, then in the district in which said dam or any part thereof is to be located, a petition setting forth the place as—
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near as may be where said dam is to be located, the height to which it will be raised, the purposes to which the water power will be applied, and such other facts as may be necessary to show the objects of the petition."

The 16th Sec. of the act is as follows :

"No mill dam shall be erected or maintained under the provisions of this act to the injury of any water power previously improved."

Sec. 25 is in the following language :

"The provisions of this act shall not apply to Olmsted county, nor destroy or impair the right of any person to erect and maintain a dam under the law heretofore and now existing."

As the jurisdiction of the Court in cases of this character depends entirely upon statutory provision, before the jurisdiction attaches facts must be stated by the petitioners, which bring the case within the purview of the act creating or conferring the jurisdiction. The first section of the act prescribes the cases in which the right to erect and maintain a dam may be obtained. If the facts stated are such as bring the case within this section, the jurisdiction of the Court is complete, although the right to the relief sought may depend on other circumstances. The rule of statutory construction applicable to this case is well settled. There is a well known distinction between an exception in the purview of an act and a proviso. If there be an exception in the enacting clause of a statute, it must be negatived in pleading, but a proviso need not. *Sedgwick on Const. and Stat. law* 62 ; *Gould's Pl. Ch.* 4, Secs. 20, 1, 2, and authorities cited.

In the first section or enacting clause of this act, there is no exception. The qualifications or limitations of the right to erect and maintain a dam, insisted upon in the first and second objections, are introduced by subsequent and distinct sections of the act. While, therefore, the matters embraced in these sections, so far as they limit the right granted by the first section, may be pleaded in bar of the relief sought by the petitioners, they are not, under the rule stated, exceptions which must be negatived in the first instance.

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The remaining objection is that the petition does not state that the land sought to be overflowed and damaged, is not owned by the petitioners nor damaged by consent.

The object of this act is two-fold. First, to grant to the owners of a mill site on a non-navigable water course, the right to improve the water power by the erection of a dam and mill on their own land, where it results in injury to the land of other persons. Second, to secure from such owners, by the same proceeding, compensation to the owners of land so injured.

The petition in this instance fully describes the several pieces of land which may be injured by the erection of the proposed dam, and states the respective owners thereof, who are other persons than the petitioners. This is all that is necessary to accomplish the object of the law, and we think sufficiently shows that the petitioners are not the owners of the land which will be injured. When an injury is alleged to person or property, the law presumes *prima facie* want of consent; it need not therefore, be alleged expressly in the first instance. For these reasons we are of opinion that the petition is sufficient, and that a certiorari should issue.

STATE OF MINNESOTA, vs. WILLIAM H. GRANT, impleaded, &c.

The State of Minnesota has capacity to sue.

The statute conferring power upon any Judge of the Supreme Court to allow writs of habeas corpus, is not in conflict with the State Constitution.

Taking of recognizances in the course of proceedings on writs of habeas corpus, is within the jurisdiction of a Judge of the Supreme Court.

In a recognizance taken before a Judge of the Supreme Court, it is only necessary that it appear upon the face of the recognizance that it was taken in a case in which the Judge might take a recognizance, and is conditioned to do some act for the performance of which a recognizance may properly be taken.

A recognizance taken out of Court cannot become a record until it is filed in the proper Court, and it must be a record before it is a complete obligation.

In a recognizance in a criminal case entered into by the Defendant and a surety conditioned for the appearance of the Defendant to answer, &c., it is not essential that the surety be called; if the Defendant is called and fails to appear it is a breach of the recognizance, although the better practice is to call the surety also.

In an action upon a recognizance it is not necessary to allege that the penalty has not been paid.

The proceedings in case of the forfeiture of a recognizance are prescribed by statute, *chapter 103, sections 28-9-30-1*; all that would seem to be required by this statute before bringing an action to recover the penalty of the recognizance, is a record of the default of the person under recognizance.

This action was brought in the District Court of Carver county upon a recognizance entered into before the Hon. Lafayette Emmett, then Chief Justice of the Supreme Court, at Chambers, in certain proceedings upon a writ of habeas corpus allowed by said Justice on the application of Defendant Pittman. The certificate of the Chief Justice, the recitals, and condition of the recognizance sufficiently appear in the opinion of the Court. The complaint sets out the recognizance at length; alleges its execution by Defendants; that at the next general term of said District Court after the execution of said recognizance the said Pittman was indicted upon the charge and for the offence mentioned in the recognizance; that said Pittman being duly called to answer said indictment, did not appear, whereupon his default was entered by the Court and said recognizance declared forfeited and demands judgment for the amount of the recognizance and interest. The Defendant William H. Grant appeared, and demurred to the complaint upon the following grounds:

I.—Because it appears on the face of said complaint that the Plaintiff has no legal capacity to sue.

II.—Because said complaint does not state facts sufficient to constitute a cause of action.

1. Because it does not appear that any such proceedings were had before the said Lafayette Emmett, as to authorize or empower

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him to demand or receive the recognizance set forth in the complaint.

2. Because it does not appear that any offence has been committed, or that there was probable cause to believe the said Ephraim Pittman guilty of any offence.

3. Because it does not appear that there has been any examination of said Pittman, or that he had been required to give bail, or had been committed for trial.

4. Because it does not appear that said Emmett, as such Justice, inquired into said case before admitting said Pittman to bail.

5. Because it does not appear that said Emmett had any power, authority or jurisdiction to take said recognizance.

6. Because it appears that this Defendant was received and executed said recognizance as bail, and not as surety, as required by the order of said Court.

7. Because it does not appear that said recognizance was ever, at any time, filed for record in the office of the Clerk of the District Court where said Pittman was to appear.

8. Because it does not appear that the recognizance set forth in the complaint, is of record.

9. Because it does not appear that there has ever been any forfeiture of said recognizance against this Defendant.

10. Because said complaint does not allege that said sum of money, mentioned in the recognizance, has not been paid.

11. Because it does not appear that the said judgment of the forfeiture of said recognizance was entered of record.

The demurrer was overruled by the Court below, and judgment entered therein against the Defendant Grant for the amount of the recognizance, interest and costs. Defendant Grant sued out a writ of error, and removed the cause to this Court.

GRANT & FREEMAN for Plaintiff in Error.

The Court below erred in overruling the demurrer for the following reasons:

I.—The jurisdiction or authority of the Court or Judge to take

the recognizance must appear by the recognizance itself, or it will be void, and must also be alleged in the complaint.

"A recognizance for the appearance of the party in a criminal prosecution should state in substance all the proceedings which show the authority of the magistrate or Court to take it." 2 *Greenleaf*, 62; 7 *Hill*, 39; 7 *Mass.*, 280; 11 *Id.*, 337; 16 *Id.*, 198; 23 *Wend.*, 49; 4 *Gilm.*, 433; 7 *Hill*, 39; 6 *Wend.*, 438; 9 *Id.*, 237; *Willes' Rp.*, 199; *Id.*, 413; 6 *Cowen*, 221.

II.—The Supreme Court of Minnesota is a Court of special and limited powers, and the Judges thereof at Chambers are magistrates whose powers are strictly defined and limited by law. *Art. 6, Sec. 2, Con. of Minn.*; *Sec. 4, Chap. 56, Comp. Stat.*; *Sec. 26, Chap. 73, Id.*; 6 *Minn. R.*, 114; *Id.*, 150.

III.—"A recognizance taken where the Court has no authority to act, is void." 11 *Mass.*, 337; 7 *Id.*, 280; 12 *Id.*, 419; 16 *Id.*, 198.

IV.—That said recognizance is void and said complaint defective and insufficient, because there is nothing in either to show that Defendant Pittman was legally arrested and confined, or that he ever had any examination before any magistrate whomsoever, in regard to said charge of larceny or any other charge. Nor does it appear that there was ever any investigation or any evidence offered in relation to said charge, either before the Chief Justice who took the recognizance, or before a committing magistrate. Nor that either the said Chief Justice or committing magistrate ever made any inquiry in regard to the probable guilt or innocence of the prisoner. Nor that they or either of them ever came to any conclusion or determination in regard to his guilt. Nor that they or either of them had probable cause or any cause to believe, or that either of them did believe him guilty of any offence whatsoever. Nor that said Chief Justice decided to commit or remand him for trial, or required him to give bail. Nor that he was ever committed by any magistrate, or by any person authorized by law to act in the premises. Nor that any offence had been committed. *Sec. 44, Chap. 73, Comp. Stat.*; 16 *Mass.*, 446; 7 *Hill*, 39; *Id.*, 44; *Park. Crim. Rep.*, Vol. 2, 571-574; *Id.*, Vol. 3, 320-323.

V.—That said Defendant Pittman could not waive any objections to the legality of his caption and detention as stated in said recognizance; and that if said arrest and imprisonment were illegal, such alleged acts would be absolutely void for duress. *Black. Com.*, Book 1, 136; 4 *Park. Crim. Rep.*, 45.

VI.—That no action can be maintained upon said recognizance until it is filed or made a record of the Court in which it is returnable; and that said complaint does not allege that said recognizance has ever been filed or made a record as aforesaid. 10 *Wend.*, 472; 4 *Id.*, 393; 4 *Park. Crim. Rep.*, 45; *Sec. 25, Chap. 103, Comp. Stat.*; 4 *Conn.*, 641; 9 *Gray*, 258; 7 *Conn.*, 209; 14 *Ill.*, 312; 4 *Gilm.*, 433; 9 *Conn.*, 350; 4 *Wend.*, 888.

VII.—That it does not appear by said complaint that any default or forfeiture of said recognizance was ever declared or entered against the Defendant Grant. Nor does it appear that judgment of forfeiture was ever entered against either of said Defendants. *Kennedy vs. People*, 15 *Ill.*, 418; *People vs. Hill*, 19 *Ill.*, 167; *Thomas vs. People*, 13 *Ill.*, 696; *Sec. 31, chap. 103, Comp. Stat.*

VIII.—That said complaint shows no cause of action against the Defendant Grant.

It neither alleges that said recognizance was declared forfeited as regarded him; nor that any default on his part was declared or entered; nor does it charge him with any default; nor that judgment of forfeiture had been entered against him; nor does it even allege that he had not paid the sum mentioned in said recognizance, and complied on his part with every particular of the conditions thereof. *Chitty on Pleading*, Vol. 2, 475, note P.; *People vs. Tilton et al.*, 13 *Wend.*, 597; *Van Sant. Plead.*, 239.

G. E. COLLE, for Defendant in error.

I.—The cases cited by the Plaintiff in error, in 7 *Mass.* 280, 11 *Mass.* 337, and 16 *Mass.* 198, and 23 *Wend.* 49, were all cases in which the absolute want of authority of the Court to require or receive it, appeared affirmatively on the face of the recognizance.

II.—The cases in 6 *Wend.* 438, 9 *Wend.* 237, *Willes' Reports*, 199, and 6 *Cowen*, 221, also relied on by the plaintiff in error, merely hold the established doctrine that in pleading the judgments of inferior tribunals the facts necessary to jurisdiction must be pleaded, and the distinction between them and a case like that at bar, where the charge or burden springs from the voluntary act of the party, is briefly but conclusively shown by Chief Justice Bronson, in *People vs. Kane*, 4 *Denio*, 545.

III.—The cases of *People vs. Koeber*, 7 *Hill*, 39, and *People vs. Young*, 7 *Hill*, 44, are the only cases cited having any tendency to support the objections to the recognizance, and these have been repeatedly overruled by the Court in which they were decided. *People vs. Kane*, 4 *Denio*, 530.

And by the Court of Appeals, *Champlin vs. The People*, 2 *Comstock*, 82.

IV.—A recognizance need not recite the special facts, which gave the officer authority to act in the particular case in which it was taken. It is enough, if he had jurisdiction in cases of that general description, and it appears that the condition is to do something to which a party may legally be bound by recognizance. *See cases cited to last point.*

V.—The breach of the condition of the recognizance is sufficiently alleged. *Secs. 28 and 31, page 748, Comp. Stat.; People vs. Higgins*, 10 *Wend.* 465.

VI.—If the Defendant has paid the amount of the recognizance, it is matter of defence, and must be pleaded by him—it is no part of the condition. *Section 29, page 748, Comp. Stat.*

VII.—The omission to state in the complaint that the recognizance was duly filed of record, may be sufficient to sustain the demurrer. It may be observed, however, that the cases holding this doctrine were decided under peculiar statutes, (*People vs. Haven*, 4 *Parker, Cr. Rep.* 52,) and that our statute does not in terms require it. *Sec. 25, page 747, Comp. Stat.*

VIII.—Should the demurrer be sustained upon this ground, it is respectfully suggested that the order contain leave to the County Attorney of Carver County to amend within twenty days after

service of the notice of the decision upon him. *Chapter 21, Laws of 1861.*

By the Court—McMILLAN, J.—This is an action brought by the State of Minnesota against Grant impleaded with Pittman, upon a recognizance entered into by them, conditioned for the appearance of said Pittman to answer any indictment that might be preferred against him touching a charge of larceny made against him on the oath of one Jacob Brihoffer. Grant, the Defendant below, demurs to the complaint.

There are two substantive grounds of demurrer:

1. That the Plaintiff has no legal capacity to sue.
2. That the complaint does not state facts sufficient to constitute a cause of action.

We do not consider it necessary to discuss the first ground of demurrer. We are clearly of opinion that it is not well taken.

The Defendant urges several objections in support of the second ground of demurrer.

The recognizance in the case appears to have been taken at Chambers before the Hon. Lafayette Emmett, Chief Justice of the Supreme Court, in the course of proceedings upon a writ of habeas corpus allowed by the Chief Justice on the application of Pittman. It appears from the certificate of the Chief Justice certifying the recognizance, that in obedience to the command of a writ of habeas corpus, allowed by his honor on the application of Pittman, directed to the Sheriff of the county of Ramsey, the said Sheriff appeared before him having with him the body of the said Pittman, together with said writ and the day and cause of the caption and detention of the relator, Pittman; that on the return of the writ the said Pittman waived all objection to the legality of said caption and detention and asked to be admitted to bail. It further appears from the recitals in the recognizance that said Pittman was charged upon the oath of one Jacob Brihoffer, of the county of Carver, Minnesota, with having on the 11th day of March, 1862, at the said county of Carver, committed the crime of larceny, by "wilfully, maliciously and feloniously steal-

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ing, taking and carrying away two bay mares of the value of three hundred dollars, and two sets of harness of the value of thirty dollars, and one sled of the value of twenty dollars, all the property of Ernest Popitz, of said county of Carver," and that said Pittman was committed to answer said charge.

The power to issue writs of habeas corpus is expressly conferred upon any Judge of the Supreme Court by the statute. *Pub. Stat., Chap. 73, Sec. 26.*

Under the Constitution of the United States, which so far as the principle involved in this case is concerned, is not materially different from that of our State, the power of Congress to confer upon the Supreme Court of the United States the authority to issue writs of habeas corpus otherwise than in the course of its appellate jurisdiction, was very ably and elaborately discussed before, and maturely considered by that Court, and while there was a difference of opinion in regard to the constitutionality of the law conferring the power upon the Court, there appeared to be no doubt in the mind of any member of the Court as to the constitutionality of the act so far as the power was conferred upon the Judges of that tribunal. *Ex parte Bollman and Swartwout, 4 Cranch., 75.*

Whatever, therefore, may be the power of the Judges of this Court to take recognizances generally, we are of opinion that the statute conferring jurisdiction to allow writs of habeas corpus, is not in conflict with the Constitution, and that the taking of recognizances in the course of proceedings on writs of habeas corpus is within the jurisdiction of the Judges of this Court.

The Chief Justice, therefore, having this jurisdiction, it is only necessary that it appear from the recognizance that it was taken in a case in which he might take a recognizance, and is conditioned to do some act for the performance of which a recognizance may be properly taken. It is true there are authorities which hold a contrary doctrine. The cases of *The People vs. Koeber, 7 Hill, 39*, and *The People vs. Young, 7 Hill, 44*, hold the doctrine that when a recognizance is taken before a Court or officer of limited jurisdiction, facts which confer the jurisdiction must appear from

the recognizance, otherwise it will be void. But these cases are distinctly overruled by subsequent decisions in New York, by a majority of the Court, in *The People vs. Kane*, 4 Denio, 530, and unanimously by the Court in *Champlin vs. The People*, 2 Comstock, 82. In the latter cases the error of the former decisions in applying the same rule to a recognizance, which is a voluntary obligation, as to a mittimus or other proceeding of that nature to which the assent of the party could not be presumed or supposed, is clearly pointed out.

From an examination of the following authorities cited by the Plaintiff in error, we find the case of 7 *Mass.*, 280, was one where a Justice took a recognizance to a party for treble damages in an action for receiving stolen goods where no such damages were authorized by statute. In 11 *Mass.*, 337, the Justice took a recognizance in a case of murder, which was not a bailable offence. In 19 *Mass.*, 197, a Justice of the Peace took a recognizance after a verdict of guilty in a court of record, which was held to be illegal, and in the case in 23 *Wend.*, one Justice took a recognizance where two Justices were required to act. In all these cases it will be perceived that the recognizances appeared upon their face to be void for want of jurisdiction in the officers taking them. They are not, therefore, applicable as authorities in this case, as an entirely different state of facts exist in this instance. But the recitals in the recognizance in this case are so full, that it is scarcely necessary to apply the rule of law applicable to such cases. It does not appear, it is true, that any examination was had before the Chief Justice upon the return of the writ of habeas corpus, but it does appear that the Defendant expressly waived all objections to his caption and detention and asked to be admitted to bail. This it was entirely competent for him to do. It is well remarked by Ruggles, J., in delivering the opinion of the Court in *Champlin vs. The People*, cited *ante*: "Although an offender is entitled to the benefit of all the forms and provisions contained in the statute, in relation to his arrest, examination and order for commitment before he can be *compelled* to enter into a recognizance to appear and answer, yet he may waive those forms,

and when charged with an offence may prefer to give bail at once, without waiting for an arrest or an examination according to the forms prescribed in the statute. This is not unfrequently done, and no doubt can be entertained of the validity of a recognizance taken under such circumstances." These remarks apply with even greater force to proceedings on habeas corpus, which are instituted at the instance of the prisoner and for his benefit, than to the case of an arrest. So far, therefore, as the first five objections are concerned, we are of opinion they are not well taken.

The sixth objection is based upon a mistake of the fact shown by the record. The order of the Chief Justice, as appears from the record, is that Pittman be admitted to bail upon entering into recognizance, &c., with sufficient *security*, &c., the order, therefore, is strictly complied with in taking the Defendant Grant as *bail*. But even if the fact was as is supposed by the Plaintiff in error, we do not think the objection would be a valid one.

The seventh and eighth objections are substantially the same; that it does not appear that the recognizance was filed. A recognizance is an obligation of record which a man enters into before some court of record or magistrate duly authorized, to do some particular act, as to appear at the assizes, &c. 2 *Bl.*, 341.

A recognizance taken out of Court cannot become a record until it is filed in the proper Court, and it must be a record before it is a complete obligation. This is the common law doctrine on the subject, (2 *Tidd's Pr.*, 1132,) and prevails in the absence of statutory change. The objection, therefore, is fatal to the complaint.

The ninth objection is that it does not appear that there has ever been any forfeiture of said recognizance as against the Defendant.

The allegations of the complaint on this point are that the said Defendant, Ephraim Pittman, being duly called by said Court to answer the said indictment, found as aforesaid, did not appear at said general term of said Court to answer to said indictment as required by his recognizance, neither did any one appear to make answer for him. The point of the objection, we apprehend, is

that the bail was not called with the principal. This is not essential, although we regard it as the better practice. The condition of the recognizance is that the Defendant Pittman appear, and his failure to appear when called was a breach of it.

The tenth objection is that it does not appear that the sum of five hundred dollars [the penalty of the recognizance] has not been paid. This is not necessary. Payment is matter which may be pleaded in defence as in other cases.

The remaining objection is that it does not appear that the judgment of forfeiture was entered of record, or in any manner recorded.

The complaint after alleging the calling of the defendant Pittman and his failure to appear, avers, "whereupon his default was recorded by said Court and said recognizance adjudged forfeited."

The proceedings in case of the forfeiture of a recognizance are prescribed by statute, *Chap. 103, secs. 28, 9, 30, and 1*. All that would seem to be required by this statute before bringing an action to recover the penalty of the recognizance is a record of the default of the person under recognizance. *Sec. 28, cited ante*. The record of the default is averred in this complaint. The objection is not well taken.

The complaint however is defective in not alleging the filing of the recognizance in the proper court, and on this ground the demurrer should have been sustained.

The judgment must therefore be reversed, with leave to the defendant in error to amend the complaint within twenty days after the service of notice of this order upon the County Attorney of Carver County. The cause is remanded to the court below for further proceedings in accordance with this opinion.

FANNY S. WILDER et al, vs. D. H. BROOKS et al.

A conveyance of real estate by husband to wife will be upheld as a suitable provision for her maintenance when it appears to be a fair transaction, not made in fraud of creditors and not unreasonable in its amount, taking into consideration all the circumstances of the case.

The record of such a conveyance stands upon the same footing as the record of any other conveyance, so far as the question of notice is concerned.

This action was brought in the District Court of Ramsey county to remove an alleged cloud on the title to certain real estate situate in said county, owned by the Plaintiffs, caused by a judgment lien of the Defendants. The cause was tried by said District Court without a jury. The following are the material facts substantially as found by the Court :

On the 30th of September, 1858, one Pease, then the owner of the real estate described in the complaint, duly conveyed the same to one Torbet, by deed, duly recorded on the same day, of which conveyance and record the wife of Torbet had knowledge. Said real estate was purchased with money received by Torbet from his wife in 1856, which she had received from a former husband, and was a part of her separate estate. On the first day of October, 1858, said Torbet executed an instrument directly to his wife, purporting to be a deed of conveyance of said real estate from him to his wife, which was recorded the same day. The Defendant Brooks recovered a judgment against said Torbet, and caused the same to be docketed in said Ramsey county, January 24th, 1859, no part of which has been paid. On the 7th of March, 1859, said Torbet and wife duly conveyed said real estate to Mrs. Harriet J. M. Rohrer, by deed, duly recorded on same day. On the third day of February, 1863, said Harriet and her husband conveyed

the premises to the Plaintiff, (Fanny S. Wilder,) by deed, duly recorded February 6th, 1863.

The following are the conclusions of law upon the foregoing facts :

The deed from Torbet to his wife, dated Oct. 1, 1858, was and is wholly void, and the legal title to the premises remained in the said Torbet, notwithstanding the execution, delivery and recording of the said instrument. By the docketing of said judgment against Torbet, the same became a legal and valid lien upon his real estate in said county, including the premises in question. The Plaintiffs at the date of the execution of the deed from Rohrer and wife, to Fanny S. Wilder, had constructive notice of the existence of said judgment lien, and of the legal effect of the instrument executed by Torbet to his wife. The Plaintiffs show no equitable claim to the relief demanded.

It was adjudged by the Court below that the action be dismissed, which judgment was duly entered.

The Plaintiffs appeal to this Court.

VAN ETEN & OFFICER, for Appellant.

I.—The deed of October 1, 1858, relates to the separate property of Mrs. Torbet, and for the purposes of that deed she is, in equity, regarded as a *femme sole*. 17 *Johns.*, 548; 4 *Barb.*, 553.

II.—The Court having found that the premises embraced in the deed of October 1, 1858, were purchased with money given by Mrs. Torbet in 1856, out of her separate estate to A. M. Torbet, the grantor, equity will sustain the deed. 4 *Kent's Commentaries*, 156-166, (8th Edition); *Shepherd vs. Shepherd*, 7 *Johns. Ch.*, 61; 4 *Barb.*, 553; 8 *Paige C. R.*, 162; 3 *Johns. C. R.*, 524; 2 *Id.*, 538; *Livingston vs. Livingston*, 7 *Johns. C. R.*, 524; *Fonbl. Eq.*, p. 97, note "N."; *Reeve's Dom. Rel.*, 90.

III.—It was competent for Torbet to divest himself of the legal title to the premises in question by deed, or a formal declaration of trust, the deed in question having been executed and delivered and recorded prior to Respondents acquiring any lien upon

the premises. If it is invalid as a conveyance of the legal title to Mrs. Torbet, it is valid as a declaration of trust in favor of Mrs. Torbet, she having paid the purchase money therefor out of her separate property.

And this construction of the instrument, or decree of October 1, 1858, does not conflict with Sec. 7, Chap. 32, relating to uses and trusts. (*Comp. Stat.*, 382.)

IV.—The equity of Mrs. Torbet (under the deed of October 1, 1858,) to the premises in question being invoked in this case, it is immaterial who invokes the aid of the Court to sustain her equity. *Vide Wall vs. Kennedy*, 3 *Cow.*, 602.

LORENZO ALLIS, for Respondents.

I.—A conveyance of real estate made directly from the husband to the wife, or from the wife to the husband during coverture, is absolutely void. It is no deed. The instrument, therefore, made by Torbet to his wife, October, 1858, was without any effect whatever, and nothing passed by it. This is too well settled to require argument or authority. But see *Chitty on Contracts*, p. 181 [168] note 1 and authorities cited; 2 *Hilliard on Real Prop.*, p. 288, secs. 50, 54, and authorities cited.

II.—When, therefore, the Respondents docketed their judgment against Torbet, the real estate stood in his name, and he had held the title thereto, since its purchase of Pease, and continued to hold it till its sale to Mrs. Rohrer, March 7th, 1859, although it was purchased with money received by Torbet from his wife's separate estate, some two years previously. It is not pretended that the Respondents before or at the time of the docketing of their judgment or afterwards, prior to the institution of this action, had any knowledge or notice that the property was bought with funds received from the wife's separate estate.

The interest of the Respondents in this real estate, therefore, is a *bona fide* legal one, older than the title of the Appellant. Hence the Appellant's title is subject to the Respondent's interest in these premises, and the Appellant cannot claim to be relieved from this

prior incumbrance. The Respondents occupy precisely the same legal position in respect to the Appellant, as though they were *bona fide* purchasers for value of this real estate. *Comp. Stat.*, (54) Sec. 1, p. 404.

III.—Whatever equities Mrs. Torbet may have against her husband, and which also she may enforce against these Respondents, it is assuredly unnecessary to remind this Court that the present Appellant cannot invoke and enforce those equities against these Respondents.

1. These equities are in their very nature unassignable.

2. In point of fact, they have never been assigned, or in any wise transferred to the Appellant.

IV.—Finally: The Appellant is not entitled to the relief which she seeks in this action because, by her own showing, she has a plain and adequate remedy at law on the covenants in her deed of conveyance from Rohrer and wife, her immediate grantors.

By the Court—BERRY, J.—The determination of this case depends upon the effect to be given to the instrument recited in the finding of the Court below, and running from Andrew M. Torbet to his wife. No question is made upon the manner of its execution or the sufficiency of its record. If it conveyed a good title to Mrs. Torbet, we perceive no reason to doubt that Mrs. Wilder, the Appellant, acquired and now possesses a good title to the property in dispute by virtue of the subsequent conveyances. It nowhere appears that the cause of action upon which the Respondents' judgment was recovered, existed at the time when the instrument above referred to was executed and recorded. Nor does it appear that at that time Andrew M. Torbet was indebted to any person, nor that he executed the instrument in anticipation of contracting the indebtedness upon which the judgment was based or any other indebtedness. Again, the instrument of conveyance was executed and placed upon record on the 1st day of October, 1858, while the judgment which the respondents claim to be a lien upon the premises, was rendered on the 16th day of January, 1859, and docketed in the county where the premises are

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situated on the 24th day of the same month. Under these circumstances there is no presumption against the transaction between Torbet and his wife, on account of fraud, actual or constructive. *Saxton vs. Wheaton*, 8 *Wheaton*, 429. And had the conveyance been made to any person other than his wife, and even for a merely nominal consideration, we see no reason why it would not have been completely unassailable. If these premises are sound, it follows that if the instrument was effectual between Andrew M. Torbet and his wife to pass the property, it was good as to all the world and *vice versa*. The first question to be encountered is as to the capacity of a wife to take property from her husband by transfer to herself directly. Blackstone says: "By marriage the husband and wife are one person in law. * * * For this reason a man cannot grant anything to his wife or enter into covenant with her; for the grant would be to suppose her separate existence, and to covenant with her would be only to covenant with himself." 1 *Bl. Com.*, 442; 2 *Kent Com.*, 129. This is unquestionably the rule at law; but in equity it is subject to some exceptions, and these contracts, gifts and conveyances running from husband to wife, directly and without the interposition of trustees or of any third person to serve as a conduit, are sometimes supported unless made in fraud of creditors, &c. *Beard vs. Beard*, 3 *Atk.*, 72; 1 *Fonbl. Eq.*, 97, note "N," and cases cited; 2 *St. Eq. Juris.*, Secs. 1372-5, 1380; *Shepard vs. Shepard*, 7 *Johns. Ch.*, 57; 2 *Kent's Com.*, 10th *Ed.*, 163, and notes; *Livingston vs. Livingston*, 2 *Johns. Ch.*, 537; 1 *Wash. R. Prop.*, 279, Sec. 14; *Whitten vs. Whitten*, 5 *Cushing*, 191; 1 *Lead. Cases Eq.*, 540, 541, 3d *Am. Ed.*; *Wallingford vs. Allen*, 10 *Peters.*, 594-5; *Sexton vs. Wheaton and wife*, 8 *Wheaton*, 242, 249; *Neufville vs. Thomson*, 3d *Ed.*, *Ch.* 92; *Reeve's Dom. Rel.*, 90; *Tullis vs. Fridley*, 9 *Minn.*, 79; *Sommons vs. McElwain*, 26 *Barb. S. C.*, 419; *Huber vs. Huber*, 10 *Ohio*, 373. It is a matter of almost daily occurrence for a husband to convey land to his wife indirectly, by conveying to some third person, who conveys to the wife directly, and this practice is sanctioned by authority. *Jewell vs. Porter & Ralfe*, 11 *Foster*, 38; *Reeve's Domestic*

Relations, 90. Contracts of all kinds, between husband and wife, are objected to not only because they are inconsistent with the common law doctrine that the parties are one person in law, but because they introduce the disturbing influences of bargain and sale into the marriage relation, and induce a separation rather than a unity of interests. But certainly neither in reason nor on principle can it be contended that so far as this objection is concerned, there is any difference between the cases of a conveyance by a husband to trustees for the use of a wife, or to a third person who conveys to the wife, or to the wife directly. Each of these would have precisely the same effect, in conferring upon the wife property and interests independent of and separate from her husband. This separation of interests is quite generally sanctioned by express enactments, and by our own statute. *Pub. St.* 571, *Sec.* 106. And the tendency of modern legislation as well as of judicial interpretation, is to improve and liberalize the marital relation by recognizing and upholding the reasonable rights of both parties to the matrimonial contract. It is stated in note "B," to page 163, 10th Ed., *Kent's Com.*, that "The English statute of 3 and 4, *William IV*, has now given sanction to this doctrine, (referring to the doctrine that gifts from husband to wife are supported without the intervention of trustees as laid down in the text,) and the husband is allowed to make a conveyance to his wife without the intervention of a trustee." This would seem to be in harmony with the rule adopted by the Courts of Equity. *See cases cited in note "B."* Under the authorities before referred to, there can be no doubt that conveyances from husband to wife directly, are sometimes upheld. And postnuptial conveyances, even when voluntary and without consideration, have been repeatedly sustained when the object was to make a settlement upon the wife or a provision for her maintenance and support. 2 *St. Eq. Juris.*, *Sec.* 1374-5; 1 *Pars. Con.*, 5th Ed., 370, and notes; 1 *Kent's Com.*, 163, 166. And where the conveyance is by an ordinary deed, and not by a formal deed of settlement, the presumption is that it was made by way of advancement and provision for the wife. *Whitten vs. Whitten*, 5 *Cush.*, 197. The Court

below finds that the property in question was, at the time of its attempted transfer to Mrs. Torbet, the whole estate of her husband, Andrew M. Torbet. Story says: "If a husband grant all his estate or property to his wife, the deed would be held inoperative in equity, as it would in law, for it would in no just sense be deemed a reasonable provision for her (which is all that courts of equity hold the wife entitled to), and in giving her the whole he would surrender all his own interests. But, on the other hand, if the nature and circumstances of the gift or grant, whether it be express or implied, are such that there is no ground to suspect fraud, but it amounts only to a reasonable provision for the wife, it will, though made after coverture, be sustained in equity." 2 *Eq. Juris.*, secs. 1374-5. To the same effect cases referred to in American notes to *White & Tudor's Lead. Cases in Eq.*, 3d Am., Ed., 540. This doctrine is quite commonly referred to by text writers. 1 *Bright on Husband and Wife*, 33. Its origin would seem to be found in a dictum of Lord Hardwicke, in *Beard vs. Beard*, 3 Atk., 72. In that case the husband by deed poll gave to his wife all his substance which he then had or might thereafter have. Lord Hardwicke held that the transaction could not take effect as a grant or deed of gift to the wife, "because the law will not permit a man in his lifetime to make a grant or conveyance to the wife, neither will this Court suffer the wife to have the whole of the husband's estate while he is living, for it is not in the nature of a provision, which is all the wife is entitled to." Unless he means that the law, as distinguished from equity, will not uphold a conveyance from husband to wife, he has so far at least been clearly overruled, as we have seen. If, however, it be true that a conveyance of his whole estate by husband to wife is inoperative, then the deed in the case before us cannot stand. In the first place it is to be observed that in the case decided by Lord Hardwicke, the transfer was not only of what the husband then had, but of all he might acquire, and it would not necessarily follow from that decision that if the conveyance had been confined to property of which the husband was then owner, it would have been held inoperative and void. That was a somewhat remarka-

ble case, and one in which the result, if the conveyance were supported, might be to reverse the natural and relative position of the parties to the marriage contract, so that the husband, instead of being the head of the family, would be transformed into a "hired man" for his wife. On the other hand, Kent lays down the rule without qualification as follows: "Gifts from the husband to the wife may be supported as her separate property if they be not prejudicial to creditors." 2 *Com.*, 163. See also *Atherly on Marriage Settlements*, 330. In *Whitten et als. vs. Whitten et als.*, 5 *Cush.*, (Mass.) 191, the husband had given the wife a power of attorney to collect and receive all moneys, &c., due or payable, belonging or coming to him and to her own use. The wife had gone on under the power collecting and making investments in her own name, until she had appropriated to herself the whole of her husband's property. Under these circumstances the Court hold as against the heirs of the husband, that "the legal estate is clearly in her, and the presumption of law is that it is for her own benefit." P. 200. In the case of *Saxton vs. Wheaton and wife*, 8 *Wheaton*, 242, where the validity of a postnuptial voluntary settlement made by a husband upon his wife was in question, Marshall, C. J., says: "It would seem to be a consequence of that absolute power which a man possesses over his own property, that he may make any disposition of it which does not interfere with the existing rights of others, and such disposition of it, if it be fair and real, will be valid." Speaking of the case before him, he says: "The appellant contends that the house and lot contained in this deed constituted the bulk of Joseph Wheaton's estate, and that the conveyance ought on that account to be deemed fraudulent. * * * If a man entirely unincumbered has a right to make a voluntary settlement of a part of his estate, it is difficult to say how much of it he may settle. In the case of *Stephens vs. Olive*, 2 *Bro. Ch. Reports*, 90, the whole real estate appears to have been settled subject to a mortgage of £500, yet that settlement was sustained." Notwithstanding our statute upon the subject of uses and trusts, we think the fact that the original purchase money of the premises

in litigation, was furnished by Mrs. Torbet out of her separate estate, has a tendency to raise a sort of meritorious consideration for the conveyance from her husband to her, (*see 2 Kent's Com.* 174,) and to establish the reasonableness and equitable standing of the provision made for her, taking into account all the circumstances of the case.

And if it was necessary to say anything further upon the question of reasonableness, so far as appears there is nothing in the amount or value of the property conveyed, consisting as it did of a house and block of lots used as a homestead, going to show that here was any extravagant or inequitable or unsuitable provision for the wife. We have not enlarged upon the fact that the house, and a part of the land upon which it was built, were before the conveyance to her subject to her rights under the homestead law, though we perceive no reason why this circumstance might not properly be taken into consideration.

We uphold the conveyance from Torbet to his wife upon the ground that all the facts considered it appears to have been a fair transaction, to amount to no more than a reasonable provision for the wife's maintenance and support, and because it was not prejudicial to creditors. Farther than this it is not necessary for us to go in this case, though if we went farther we should not be compelled to go alone.

It is claimed by the respondent that whatever right Mrs. Torbet had was but an equity, and so in the absence of actual notice the judgment lien under our statute was paramount. *Pub. Stat.*, 404, *Sec.* 54. Our recording statutes, however, appear to make no distinction between the effect of the record of a conveyance passing a title in law, and of an instrument raising an equity. The term "conveyance" is defined in the statute "to embrace every instrument in writing by which any estate or interest in real estate is created, &c., or by which the title to any real estate may be affected in law or equity," &c. *Pub. Stat.* 405, *Sec.* 63. And all such conveyances seem to be put upon the same footing, so far as the record is made notice.

The judgment below is reversed, and the cause remanded with

instructions to render judgment for the plaintiff conformably to this decision.

IRA BIDWELL, vs. SARAH B. WEBB.

The notice of sale required by the act entitled "An act in relation to the redemption of lands sold for taxes, and relating to taxes and tax sales, approved March 11, 1862," is essential to the validity of the sale.

A notice of sale containing no further description of the premises than the following, viz :

"ROBERTS & RANDALL'S ADDITION.

"Lot 11, Blk 20

"Lot 12, Blk 20,"

And nowhere describing said lots or said Addition as being in the city of Saint Paul, nor in Ramsey county, nor mentioning nor referring in any manner to said county except that the notice was headed "Auditor's Office, Ramsey County, Minn., St. Paul, Dec. 8, 1862," is insufficient.

The statement at the head of the notice is merely the date of the advertisement identifying the Auditor's office whence and the time when the notice issued, and cannot be regarded as referring to the premises to be sold, or aid in the description.

The purchaser of the premises at a tax sale in pursuance of such notice, acquired no title.

The only matters embraced within the purview of *Sec. 1, Chap. 64 of the Compiled Statutes*, are claims to estates or interests in real property adverse to the occupant.

The lien conferred by the 8th section of the tax law referred to, cannot be adjudicated in an action under section 1, chapter 64, above mentioned; but the purchaser at the tax sale must resort to a *separaté* action to enforce such lien.

This action was brought in the Ramsey County District Court, under *Sec. 1, Chap. 64, Pub. Stat.*, to determine the adverse claim of the defendant to certain real estate in the city of St. Paul, of

which the plaintiff claimed to be in possession. The case was tried in the court below by a referee, who found in favor of the plaintiff, and judgment was entered up against the defendant, who sued out a writ of error, and brought the cause to this court. A sufficient statement of the case will be found in the opinion of the court.

SMITH & GILMAN, with EDWARD WEBB, for Plaintiff in Error.

GEO. L. OTIS, for Defendant in Error.

By the Court—McMILLAN, J.—This action is brought under sec. 1, chap. 64 of the *Compiled Statutes*. The complaint alleges that the plaintiff is the owner and in possession of Lots 11 and 12, in Block 20, in Roberts & Randall's Addition to St. Paul, and that the defendant claims an interest and estate in and to the premises adverse to the plaintiff, and demands that such adverse claim, estate and interest be determined, &c.

The defendant, after taking issue on the allegations in the complaint, sets up a title by purchase at tax sale under the provisions of an act of the Legislature, approved March 11, 1862, entitled "An act in relation to the redemption of lands sold for taxes, and relating to taxes and tax sales." She also claims a lien on the premises, in case her title should be adjudged invalid, for the amount of the purchase money and subsequent taxes on the premises paid by her.

The first question to be determined is the validity of the title acquired by the defendant by the tax sale. Section 7 of the act referred to is as follows: That any person having or claiming any right, title or interest in or to any land or premises after a sale under the provisions of this act adverse to the title or claim of the purchaser at any such tax sale, his heirs or assigns, shall within one year from the time of the recording of the tax deed for such premises commence an action for the purpose of testing the validity of such sale, or be forever barred in the premises. *Sess. Laws*, 1862, p. 35. The tax deed of the defendant was

recorded on the 23d day of December, 1863. This action was commenced in January, 1864. The action having been brought within the time limited by the statute, the validity of the sale is a proper subject of inquiry.

The second section of the act prescribes, among other things, that it shall be the duty of the County Auditor to advertise the lands for sale, stating therein that such lands will be sold as forfeited to the State under the provisions of the act, and the time and place of sale, which time shall be on the second Monday in January, 1863. There is no provision making the tax deed evidence of the preliminary proceedings. The notice of sale required by the statute is essential to the validity of the sale; it is a condition precedent to the authority of the officer to sell the land. The referee finds that the notice of sale in this case contained no further description of the premises than the following, viz :

"ROBERTS & RANDALL'S ADDITION.

"Lot 11, Blk 20

"Lot 12, Blk 20,"

"And nowhere described said lots or said addition as being in the city of St. Paul, nor in Ramsey county, nor was said county mentioned nor in any manner referred to in said notice, except that the same was headed and dated as follows :

"Auditor's Office, Ramsey County, Minn., St. Paul, December 8, 1862."

One object of advertising tax sales is to give notice to the tax payer that he may pay the tax; another equally important is to give notice to the public that they may have an opportunity of being present at the sale and bidding for the land. In describing the land the advertisement must give a particular and certain description, so that the owner may know that it is his land, and bidders may ascertain its locality with a view to the regulation of their bids. *Blackwell on Tax Titles*, p. 266. The description in this case is insufficient. It is impossible to determine from the description of the land in the notice what addition of Roberts & Randall is referred to. It may be an addition to St. Paul, St. Anthony, or any other place—it may be in Ramsey or any other

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county. The plaintiff was not informed by this notice that it was his land was taxed, nor could bidders ascertain from the notice the locality of the land. The statement at the head of the notice is merely the date of the advertisement identifying the Auditor's office whence, and the time when the notice issued, and cannot be regarded as referring to the premises to be sold, or aid in their description. The officer therefore had no authority to sell, and the sale is void. The defendant therefore acquired no title by her purchase and took nothing by her deed.

As a further defence the defendant sets up facts which she claims constitute a lien in her favor on the premises described in the complaint.

The section of the statute under which this action is brought is as follows: "An action may be brought by any person in possession, by himself or his tenants, of real property, against any person who may claim an estate or interest therein adverse to him, for the purpose of determining such adverse claim, estate or interest." *Comp. Stat., chap. 64, sec. 1, p. 595.*

The only matters embraced within the purview of this section are claims of *estates* or *interests* in real property adverse to the occupant. *Meigher et al. vs. Strong, 6 Minn., 179.* A lien upon land is not an estate or interest in it, but merely a charge upon it. *2 Bouv. L. Dic., Title Lien.* So far, therefore, as the defendant's claim for a lien on the premises is concerned, it is not by the terms of the statute a proper subject for adjudication in this action. Nor is this such an action as is contemplated by the 8th section of the tax law which confers the lien and provides that it "may be enforced by action or required by the Court to be paid before awarding a writ of possession to the person claiming adversely to the purchaser at the tax sale or his assignee," for, as the plaintiff must necessarily be in possession to maintain this action, he neither asks nor needs aid from the Court to obtain possession. The defence, therefore, cannot be sustained, but the defendant must resort to a separate action to enforce her lien. This view of the case renders it unnecessary to consider any other of the questions raised upon the argument. But as the judgment

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entered in the Court below determines that the defendant has no interest, *lien* or estate, in or to the premises, it should be so modified as to exclude any adjudication upon the question of the defendant's lien upon the premises. With this modification the judgment below is affirmed.

STATE OF MINNESOTA ex rel. BETTY SAVAGE, vs. CORBETT HILL.

An order of the District Court setting aside an order made by a Court Commissioner in a habeas corpus proceeding discharging the relator, is an appealable order.

Habeas corpus proceedings are within the jurisdiction of a Judge of the District Court at chambers.

Under our constitution and laws a Court Commissioner has jurisdiction to grant a writ of habeas corpus returnable before himself, and proceed to the hearing and determination thereof, where the prisoner is detained in the county in which he resides; and the Court Commissioner of one county has like jurisdiction in cases where the prisoner is detained in an adjoining county, if it properly appears that there is no officer in such adjoining county authorized to grant the writ, or if there be one, that he is absent or for any cause be incapable of acting, or has refused to grant the writ.

In a proceeding under the provisions of *Chap. 19, Comp. Stat.*, before a Justice of the Peace in Le Sueur County, Corbett Hill, defendant, was ordered to enter into recognizance for his appearance at the District Court of that county, or in default thereof to stand committed. Default being made, Hill was taken into custody by a constable of said county. On application of Hill, a writ of habeas corpus was issued by Charles S. Bryant, Esq., a Court Commissioner of Nicollet County, there being no officer in Le Sueur County authorized to grant such writ, and said Nicollet County being an adjoining county thereto. Upon the return of

the writ the Commissioner ordered the discharge of said Hill from custody. A motion was thereupon made by plaintiff before the District Court of Le Sueur County for an order setting aside the order of the Commissioner discharging said Hill. Upon the hearing of said motion such order was made by the Court, and the said Hill appealed therefrom to this Court.

Cox & GRIFFIN for Appellant.

The Court below erred in the order herein that "The hearing and determination of a writ of habeas corpus is not chambers' business. The Court Commissioner had no authority in the law to hear and determine such cause."

It will not be denied that a Court Commissioner has the same power and jurisdiction, judicially, that a Judge of the District Court has at chambers. *Constitution of Minnesota, Section 15, Article 6.*

At common law the writ issued out of the Court of King's Bench, not only in term time but also during the vacation, by a fiat from the Chief Justice or any other of the Judges. * * *

If it issues in vacation it is usually returnable before the Judge himself who awarded it, and he proceeds by himself thereon. 3 *Black.*, (marg.), 131. Judge may grant writ returnable immediately at chambers. 36 *Eng. C. L.*, 354.

In chancery also in vacation the Chancellor may issue writ. *Lord Eldon in Arnly's case overruling Jenks' case.* *Black.* 3, 132, n. 23.

In the United States (2 *Kent*, 634), the application for the writ must be to the Supreme Court Chancellor, or Judge of the Court, or other officer having the power of a Judge at chambers. *Id.*, 327.

Hearing upon return recognized as chambers' business in *People ex rel. Harris vs. Taylor*, 1 *Scam.*, 202; 10 *Johns.*, 328; 4 *Id.*, 317; *Yates vs. People*, 6 *Id.*, 337; *Yates vs. Lansing*, 4 *Id.*; 1 *Minn.*, 60; 3 *How. Pr. R.*, 32, 39; *Monell's Pr.*, 30.

Our habeas corpus act makes the allowance and hearing upon a return, chambers' business, and expressly confers the power on a

Court Commissioner by name. *Comp. Stat.*, 635; *Act of 1858 conferring power on Judges of Probate; Sess. Laws of 1860, 2 and 3.*

AUSTIN & WARNER, for Respondent.

I.—The order from which the defendant attempts an appeal in this proceeding, is not an appealable order.

The order is one in a special proceeding, but is not a “final” order, and hence not appealable.

The application for the writ and for a hearing and discharge of the prisoner, is not barred by the order.

II.—1. The order of the Judge setting aside the judgment of the Court Commissioner was correct, warranted and required by the law. Such Commissioner can exercise only the “powers of a Judge of the District Court at Chambers.” *Sec. 15, Art. 6, of the Constitution.*

The Commissioner might, perhaps, *allow* the writ and make it returnable before the Court, when the Court might try the issue and render judgment. But the hearing, the examination, the judgment necessary to the discharge of the prisoner, are not Chambers’ business. *Secs. 44, 46, 49, Chap. 73, Comp. Statute; Gere vs. Weed & Avery, 3 Minn., 352; Pulver vs. Grooves, Id. 359.*

2. The practice in England has never made Chambers’ business of either the application for, the allowance of, or the hearing or trial upon the return of a writ of habeas corpus.

Until the statute of Charles II., the application for the writ was made at the term, and the writ was returnable to and the hearing or trial had at the term. Since then, by virtue of that statute, the writ might be allowed and the hearing had in vacation, but has never been considered Chambers’ business. *See Hurd on habeas corpus.*

III.—1. The Commissioner had no authority to issue the writ on the application in behalf of the prisoner, the Commissioner be-

ing an officer of one county, with a local jurisdiction, and the prisoner confined in another county.

2. The Commissioner had no authority to issue the writ under *Sec. 26, page 635, Comp. Stat.* For under that section the Commissioner of Le Sueur county could not allow the writ, and certainly the Commissioner of *another* county could not have a superior power.

By the Court—McMILLAN, J.—The motion to dismiss the appeal in this case must be denied. The order discharging the relator, Hill, on the writ of habeas corpus is final, and assuming that the District Court had jurisdiction to make the order setting aside the discharge, no objection to the jurisdiction being made, still no further proceedings can be had under the habeas corpus. Therefore an appeal lies under our statute.

We come then to consider the merits of the appeal. Although the chain of authorities is not unbroken, we consider the principle established that at common law a Judge in vacation may grant a writ of habeas corpus, returnable before himself at Chambers. 3 *Bl. Com.* 131, (*marg.*); 2 *Kent*, 26; *case of Leonard Watson and others*, 36 *Eng. Com. L.* 254; 9 *Adolph & El.*, 731. In our State the power is expressly conferred by statute, among other officers, upon a Judge of the District Court. *Comp. Stat. Ch.* 73, *Secs.* 26, 39.

In pursuance of the constitutional provision, the legislature has provided for the office of Court Commissioner in each county, and has conferred on that officer the power and jurisdiction of a Judge of the District Court at Chambers.

Sec. 26, Ch. 73, of the Compiled Statutes provides that application for the writ of habeas corpus may be made "to any Judge of the Supreme or District Courts, being within the county where the prisoner is detained; or if there be no such officer within such county, or if he be absent or for any cause be incapable of acting, or have refused to grant such writ, then to some officer having such authority residing in any adjoining county."

Section 27 of the same chapter provides "whenever application for any such writ shall be made to any officer not residing within the county where the prisoner shall be detained, he shall require proof by the oath of the party applying, or by other sufficient evidence that there is no officer in such county authorized to grant the writ, or if there be one that he is absent," &c.

In view of these provisions we think it cannot be doubted that a Court Commissioner has power to grant the writ, when the applicant is detained in his own county. In this case, although the fact is omitted in the paper book, the record shows that it appeared on the application for the writ made to the Court Commissioner of Nicollet, the adjoining county, that there was no officer in Le Sueur county in which the prisoner was detained, authorized to grant the writ. In this event, by *sec. 26*, cited ante, which we think is in harmony with the constitutional provision, the application is to be made to an officer in an adjoining county, which was done in this instance.

We think, therefore, the Court Commissioner in this case had authority and jurisdiction to grant the writ returnable before himself, and proceed to the hearing and determination of the habeas corpus, and that the order of the District Court vacating and setting aside the discharge was erroneous and should be reversed.

JOHN A. MOULTON, vs. MICHAEL DORAN, County Treasurer of
Le Sueur County, impleaded with WILLIAM SMITH, County
Auditor, &c., et al.

The complaint shows that before the commencement of this action the plaintiff "was lawfully seized and possessed of Block 23 in the town of Kasota, Le Sueur County, composed" and comprising ten distinct and separate lots, numbered from one to ten inclusive, which piece, parcel or tract of land had been

surveyed and platted as aforesaid, and the plat thereof filed in the office of the Register of Deeds for said county, during the year 1855." It is admitted by plaintiff's counsel that said Block was originally assessed as one tract. In 1862 the plaintiff was the owner of the Block, and there were then on it taxes for 1859 and previous years. In January, 1863, the taxes remaining unpaid, the Block (as one tract) was sold in pursuance of the provisions of *Chapter 4 of the Laws of 1862*. The plaintiff in his complaint alleges "That said sale is totally void and of none effect, for the reason that said block being subdivided as herein before set forth, into lots, was not offered and sold in separate parcels, but as a whole tract." This action is brought to have said sale declared invalid for that reason. The validity of the assessment is not questioned except as in the portions of the complaint above quoted. *Held*—that in this case we can only take into account errors that are properly and peculiarly errors in the *sale* as distinguished from those that are errors in the *assessment* and proceedings antecedent to the notice of sale. That the Block having been originally assessed as a single tract, the Treasurer had no authority to sell in lots, nor, having sold it as one tract, had he any authority to permit a redemption of two lots without a payment of the whole tax due. That in the *sale* of the Block as one parcel, there was no error.

That facts in a pleading must be alleged directly and positively, and not by way of rehearsal, argument, reference or reasoning, and if not thus alleged they are not admitted by a failure to traverse them.

That in this case it is not alleged in a traversable form, or positively alleged at all, that said block was legally subdivided into lots.

This action was commenced in the District Court of Le Sueur County, against the Auditor and Treasurer of that county, and Erastus Edgerton and A. S. Cowley. The plaintiff in his complaint alleges "that before the commencement of this action the plaintiff was lawfully seized and possessed of in his own right in fee of Block No. 23, in the town of Kasota, in the County of Le Sueur and State of Minnesota, composed and comprising ten distinct and separate lots, numbered from one to ten inclusive, which piece, parcel or tract of land had been surveyed or platted as aforesaid, and the plat thereof filed in the office of the Register of Deeds for said Le Sueur County during the year 1855; that certain taxes assessed prior to the year 1859 were returned upon said Block as unpaid and delinquent; * * * that in default of the payment of said taxes by plaintiff, on or about the 12th day of

January, 1863, the said Block * * * was sold for the non-payment of said taxes, &c., &c., in pursuance of *Chapter 4 of Laws of 1862*, and defendants Edgerton and Cowley became the purchasers," who received from the Auditor of said county a certificate of the sale, &c., &c., and that a deed of said Block had been executed by said Auditor to said defendants Edgerton and Cowley, in pursuance of said sale and certificate. "And the plaintiff avers and charges the fact to be that said sale is totally void and of none effect, for the reason that said block of land, being subdivided as herein before set forth, into lots, was not offered and was not sold by defendant Doran, County Treasurer, in separate lots and parcels, but was offered and sold as a whole tract or parcel."

"And for a further cause of action the plaintiff alleges that on the 13th day of January, 1864, and within one year from the day of said sale, the plaintiff tendered the *pro rata* amount of the entire tax, interest, penalty and charges upon said block, for the payment and redemption money of lots numbered 6 and 7 in said block, to the Auditor and Treasurer of said county, who refused to take the same or allow the plaintiff to redeem any part or portion of said block less than the whole thereof." The plaintiff demands that the sale be set aside, and the said certificate and deed be cancelled and declared null and void.

The defendant Doran appeared and answered, and thereupon the plaintiff moved the Court for an order "striking out the answer of defendant Doran for irrelevancy, and for judgment as for want of an answer." The Court granted the motion so far as to strike out the answer of defendant Doran, but refused to order judgment as for want of an answer upon the ground that the complaint does not state facts sufficient to constitute a cause of action. The plaintiff appealed from that part of the order refusing to order judgment, to this Court.

Cox & GRIFFIN for Appellant.

A. G. CHATFIELD for Respondent.

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By the Court—WILSON, C. J.—The plaintiff alleges that before the commencement of this action, he “was lawfully seized and possessed in his own right, in fee, of block numbered twenty-three in the town of Kasota, in the county of Le Sueur and State of Minnesota, composed and comprising ten distinct and separate lots, numbered from one to ten inclusive, which piece, parcel or tract of land had been surveyed and platted as aforesaid, and the plat thereof filed for record in the office of the Register of Deeds for said county during the year 1855.” It is inferable from the complaint, and admitted by the plaintiff’s counsel in the argument, that said block was originally *assessed as one tract*. In 1862 the plaintiff was the owner of the block, and there were then on it taxes for the year 1859 and previous years. In January, 1863, the taxes remaining unpaid, the block (*as one tract*,) was sold in pursuance of the provisions of *Chap. 4, of Laws of 1862*. The plaintiff in his complaint alleges “that said sale is totally void and of none effect, for the reason that said block of land being subdivided, as hereinbefore set forth, into lots, was not offered and sold in separate parcels but as a whole tract,” and this action is brought to have said sale declared invalid for that reason. We think the facts alleged do not show the plaintiff entitled to the relief prayed for. The law under which the sale was made, provides (*Sec. 6*,) that an action to test or in any manner question the validity or regularity of the *assessment* can only be commenced prior to the sale, and (*Sec. 7*,) that an action to test the validity of the *sale*, shall be commenced within one year from the recording of the tax deed, thus clearly distinguishing between errors in the assessment and errors in the sale. If the law is constitutional, which we will presume in this case, as it is not questioned, then the only errors which we can take into account here are those that are properly and peculiarly errors in *the sale*, as distinguished from those that are errors in the assessment or proceedings, antecedent to the notice of sale. The block having been originally assessed as a single tract, the County Treasurer had no authority to sell in lots. It was his duty to sell in the sub-divisions in which

the property was assessed. He was not presumed to know or bound to enquire whether the block was sub-divided into lots. The act under which the sale was made, required that the premises should be sold for an amount not less than that for which they might have been redeemed, and inasmuch as the lots had not been assessed separately, it was not possible for him to ascertain the sum for which any single lot should be sold. There is no presumption either of law or fact, that the several lots in a block are equal in value. It is true that the law required that each tract or parcel be separately sold, but this when read by the light of the other provisions of the same act, can only be held to mean that each parcel, *as assessed*, shall be sold separately. *In the sale* of this block, therefore, we think there was no error, and no question being made as to the validity of the assessment, it is not for us here to pass upon it. It is true that an error in the assessment is fundamental, and ordinarily renders void all subsequent proceedings, but the fact must be found to exist before any conclusion can be drawn from it; and before the Court can find or pass upon a fact, it must be admitted or presented for adjudication. This view is decisive of the case, for it is clear that the Treasurer could not legally permit the plaintiff to redeem two of the lots without paying the tax on the whole block. But if we are not correct in this view, still we think the plaintiff could not recover. The rule of pleading is well settled that facts must be alleged directly and positively, and not by way of rehearsal, argument, inference or reasoning, and if not thus alleged they are not admitted by a failure to traverse them. In the portions of the complaint above quoted, are found the only allegations that said block was legally sub-divided into lots at the time of the tax sale, while the fact that said block was sub-divided into lots may be inferred from the complaint, yet it is not alleged in a traversable form or positively alleged at all, and is therefore not admitted. The act of the legislature, under which the sale was made, was approved in time by the Governor. *Stinson vs. Smith*, 8 Minn., 366.

Order of Court below affirmed.

BERRY, J.—Upon the ground last taken in the foregoing opinion, I agree with the conclusion arrived at.

FREDERICK W. ANDREWS vs. PHILO STONE.

In an action for damages for a simple assault and battery, it is not necessary to charge *in terms* that it was "willful" or "malicious," to entitle the plaintiff to maintain his action.

In such an action when no *special* damages are laid, the plaintiff is not confined to the recovery of merely *nominal* damages, but may recover such general damages as he may prove to have resulted from the injury.

This is an action for damages for an assault and battery. The complaint alleges that on the 4th day of November, 1862, at Wabashaw, "the said defendant with force and arms assaulted this plaintiff, and with force and violence with his fists, gave and struck this plaintiff a great many blows and strokes on and about divers parts of his body, and with great force and violence struck and pulled about the said plaintiff, and cast and threw the said plaintiff down to and upon the ground, and then and there violently kicked the said plaintiff; by means of which assault, the said plaintiff was then and there greatly hurt, bruised and wounded, and became and was sore and lame, and so remained and continued for a long time following, and underwent great bodily pain and mental anguish, and demands judgment," &c. The defendant in his answer admits that at the time and place mentioned, he "assaulted and beat the plaintiff a very little, mostly with the back of his hand," &c., and denies the consequences of such assault as stated in the complaint, and says "that at the time he committed said assault, he was laboring under intense excitement,

caused by the insulting, abusive and provoking language used by the plaintiff, for the purpose of enraging him."

The reply was a general denial of the answer.

The cause was tried by a jury and a verdict rendered in favor of plaintiff against the defendant for \$125.00, and a judgment entered thereon; and the defendant appeals therefrom.

L. L. CAMPBELL, for Appellant.

The verdict in this case is erroneous, for that it appears from said complaint that the assault complained of was not willful or malicious on the part of the defendant, and therefore, the plaintiff could only recover nominal damages, and not vindictive damages.

No special damages are alleged in the complaint, therefore the amount assessed by the jury could only be nominal.

The complaint does not constitute a cause of action.

WILDER & WILLISTON and J. A. MURDOCK for Respondent.

I.—While it may, perhaps, be claimed that the complaint in this action is not in all its parts framed with perfect artistic skill, we submit it will compare favorably with the majority of pleadings in this State under our code. In any event we insist that it is good upon demurrer, and if so is certainly good after verdict. True it does not allege the assault and beating in terms to have been "unlawfully" done, nor was this necessary unless the position is assumed that the technicality of criminal pleading is required in civil actions, or that no one is answerable in damages for personal injuries by him done to another, however severe they may be, unless the criminal law be thereby violated. We think the counsel for the appellant will hesitate before attempting to urge either of these propositions.

II.—The answer admits the wrong and the injury, and seeks to make no defence whatever except to mitigate the damages, and this only by alleging that the assault and battery was provoked by insulting words. It admits, therefore, the assault and battery

to have been unlawful, and to have been committed in anger.

III.—No special damages were recovered, nor sought to be recovered; the jury gave us damages direct and immediate from the injury complained of, and such damages we were entitled to recover. They were damages only co-extensive with the injuries actually inflicted.

By the Court—McMILLAN, J.—This is an action brought to recover damages for an assault and battery. The cause was tried by a jury in the District Court, and a verdict rendered in favor of the plaintiff for one hundred and twenty-five dollars damages.

The first two points made by the appellant are as follows:

1. The verdict in this case is erroneous for that it appears from said complaint that the assault complained of was not willful or malicious on the part of the defendant, and therefore the plaintiff could only recover nominal damages, and not vindictive damages.

2. No special damages are alleged in the complaint; therefore the amount assessed by the jury could only be nominal.

These two objections may be disposed of together. The complaint charges an assault and battery in the usual form. It is not necessary, in an action for a simple assault and battery, to charge in terms that it was "willful" or "malicious," to entitle the plaintiff to maintain his action. 1 *Ch. R.*, 396; *Starkie's Criminal Pl.*, 85.

The plaintiff is not confined to the recovery of merely *nominal* damages on this action, but may recover such *general* damages as he may prove to have resulted from the injury. The paper book contains only the pleadings in the cause; no part of the evidence or proceedings in the trial are before us, and there is nothing in the amount of the verdict from which we can infer that the jury allowed any other than the general damages proved by the plaintiff. The objections, therefore, cannot be sustained.

The remaining objection stated in the appellant's brief is that "the complaint does not constitute a cause of action."

The appellant has omitted to call our attention in any manner to any ground upon which he rests this objection, and we do not

discover any defect in the complaint of which the appellant can here take advantage.

The judgment of the Court below is affirmed.

ALBERT GALLOWAY vs. J. B. YATES and GEORGE B. HAYES.

An undertaking (given on appeal from an order,) by which the parties executing the same agree in case a certain judgment be affirmed in whole or in part to pay such judgment, or the part as to which it is affirmed, will not support an action against such parties where it appears that as a matter of fact no such judgment was ever rendered.

The refusal to pay a judgment entered in accordance with the affirmance of the order appealed from in such case, is not a breach of the undertaking.

This action was brought in the District Court of Mower county, upon an undertaking on appeal, executed by the defendants in a certain action in said Court, wherein the above named Albert Galloway was plaintiff, and William Litchfield, Valorus P. Lewis and Franklin D. Lewis were defendants, which recites that a verdict was returned in said action in favor of the plaintiff, and against the defendants therein, for \$105.60; that the defendants in said action moved to set aside the verdict, for a new trial and in arrest of judgment; that thereupon the Court ordered judgment to be entered on said verdict, for said sum, and for defendants' charges and disbursements, to be taxed by the Clerk, and for other relief *as by reference to said judgment* will appear, and that all further proceedings be stayed until the decision of said motion; that afterwards said motion was denied, and the defendants feeling aggrieved thereby, intend to appeal therefrom to the Supreme Court of the State of Minnesota. And the defendants Yates and Hayes therein, undertake "that the said appellants (defendants in said

action,) shall prosecute their appeal with effect, and pay all costs and damages which may be awarded against them on said appeal, not exceeding two hundred and fifty dollars, and that if said judgment be affirmed, or any part thereof be affirmed, said appellants shall pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, and shall abide the order and judgment which the Appellate Court may make in the premises." The plaintiff in his complaint sets out substantially the execution of the undertaking, its terms and recitals, and alleges that the defendants in said action did prosecute their appeal in said Supreme Court; that said Court by its decision in said action "ordered that the said order appealed from be reversed unless the respondent therein, within ten days after service of a copy of said order, should remit from the verdict of the jury the statutory damages assessed against said Litchfield and Valorus P. Lewis, and consent to take judgment against Franklin D. Lewis alone, in which event said order appealed from was affirmed;" that said action was remanded to the Court below, when, the plaintiff having remitted from the verdict of the jury the statutory damages assessed against the other defendants, judgment was rendered against said Franklin D. Lewis alone for \$105.60; that execution was issued on said judgment, which was returned "*nulla bona*," but it contains no averment that judgment was entered before the appeal, or before the undertaking was executed. The answer, in brief, avers that the defendants have fully kept the covenants contained in the undertaking; avers that at the time of the execution of the undertaking there was no judgment entered up in said cause; that no judgment of said Court, (the Court below,) nor any part of any judgment in said Court, in said cause was affirmed, by the Supreme Court on said appeal.

A motion was made by the plaintiff that judgment be rendered in favor of the plaintiff, notwithstanding the answer, which motion was allowed, and from the order allowing the same, the defendant appeals to this Court.

C. G. RIPLEY for Appellant.

JONES & BUTLER for Respondent.

By the Court—BERRY, J.—We deem it unnecessary to determine the questions of practice raised by the counsel for the appellants. Granting that the answer was sham or frivolous, and that it was entirely proper to disregard it, we think the respondent was not entitled to judgment upon his complaint, for reasons which go to the merits of the case. We infer from the complaint that no judgment had in fact been entered prior to the former appeal, both because the complaint in this action omits to set out the entry of any such judgment, and because none was reversed or set aside by the Supreme Court. We do not see how it could be contended that on an appeal from an order denying a motion to set aside a verdict, &c., no judgment having in fact been entered, an undertaking by which the parties executing the same, bind themselves in case a judgment which has no existence “be affirmed or any part thereof be affirmed,” that they will “pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed,” could possess any force or vitality whatever. Nor granting that judgment had actually been entered, do we perceive how an action could be maintained upon such an undertaking, without some further allegation and proof of the existence of a judgment, than the loose recital or rather allusion to its rendition contained in the undertaking upon which the present action is brought. It is not claimed that there has been any breach of the agreements mentioned in the undertaking, except in respect of the non-payment of the judgment. Was there any breach in this respect? By the terms of the undertaking, the appellants bound themselves, “if said judgment be affirmed or any part thereof be affirmed,” to pay “the amount directed to be paid by the judgment or the part of such amount as to which the judgment shall be affirmed.” Now, even assuming that a judgment had been entered before the appeal was taken, has the contingency upon the occurring of which they bound themselves to pay arrived? The order of the Appel-
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late Court was (8 *Minn.*, 188,) "that the said order appealed from be reversed, unless the plaintiff (that is, the respondent here,) should remit from the verdict of the jury the statutory damages assessed against said Litchfield and V. P. Lewis, and consent to take judgment against F. D. Lewis alone, in which event said order appealed from is affirmed," and the District Court "was instructed to permit the plaintiff to enter judgment therein upon the verdict in accordance with said order," which was done. Now all that was done by the Supreme Court, was to affirm or rather modify an *order*, not a judgment in whole or in part. This was not by the terms of the undertaking, the contingency upon the happening of which the appellants agreed to pay. There has been no breach upon their part.

The order of the Court below for judgment on the pleadings, and notwithstanding the answer, is reversed.

**IN THE MATTER OF THE APPLICATION OF THE SENATE OF THE
STATE OF MINNESOTA TO THE SUPREME COURT FOR THEIR
OPINION ON CERTAIN QUESTIONS OF LAW.**

Section 15, Chap. 4, Compiled Statutes, which provides that "either House may, by resolution, request the opinion of the Supreme Court, or any one or more of the Judges thereof, upon a given subject, and it shall be the duty of such Court or Judges when so requested, respectively, to give such opinion in writing," is unconstitutional and void, and therefore imposes no duty on the Court.

Any opinion expressed in pursuance of action under said section is extra-judicial, and no official responsibility attaches to the Judge or Court voluntarily giving such opinion.

It is the duty of each department of the government to abstain from and oppose encroachments on either of the others.

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The duty sought to be imposed by this section is neither a judicial act, nor is it to be performed in a judicial manner; it constitutes the Supreme Court the advisers of the Legislature, nothing more.

An unauthorized expression of opinion by a Judge or Court, especially one of last resort, upon a matter which may subsequently come before the Court for adjudication, is improper.

At a session of the Legislature of this State in 1865 the following resolution was adopted by the Senate, to-wit:

Resolved, That the Supreme Court be and they are hereby respectfully requested to furnish the Senate their opinion upon the following questions:

"1. Whether the persons named in the act of the Legislative Assembly of the Territory of Minnesota, entitled 'A bill for an act entitled an act to incorporate the Nebraska and Lake Superior Railroad Company,' approved May 23, 1857, ever became a legally constituted corporation. If so, when and by what act, and was it competent for the Legislature of the State by amendment of said act, to transfer their corporate rights and franchises to others without their consent.

"2. Whether the act of the Legislature of the State of Minnesota, entitled 'An act to amend an act entitled an act to incorporate the Nebraska and Lake Superior Railroad Company,' approved March 8, 1861, is or is not in conflict with the Constitution of this State or of the United States; and whether by virtue of said last named act the persons therein named, or any persons, have acquired any property rights.

"3. Whether the act of the Legislature of this State, entitled 'An act to extend the time for the grading and completion of the Lake Superior and Mississippi Railroad,' approved March 6, 1863, was or is of any force or effect.

"4. Whether the act of the Legislature of this State entitled 'An act to legalize the action of the Common Council of the city of St. Paul in relation to the bonds of said city in the aid of the construction of the Lake Superior and Mississippi Railroad,' approved February 3, 1864, is of any force or effect.

"5. Whether there is any duly and constitutionally created or chartered corporation, by the name of the Lake Superior and Mississippi Railroad Company. If so, when and under what act created or chartered; has it received any grant of land or other State aid, and what the legal liabilities of the stockholders in regard to its obligations."

Whereupon the Court, in answer to such resolution, returned to the Senate the following opinion.

By the Court—McMILLAN, J.—A copy of the resolution of the Senate requesting the Supreme Court to furnish the Senate with their opinion upon certain questions stated in the resolution was communicated to the Court yesterday.

We have had the matter under advisement, and given it that consideration which a communication from so high a source is entitled to receive.

The resolution, we presume, was passed in view of *Sec. 15, Ch. 4, Comp. Stat.*, which provides that "either house may, by resolution, request the opinion of the Supreme Court, or any one or more of the Judges thereof, upon a given subject, and it shall be the duty of such Court or Judges when so requested, respectively, to give such opinion in writing."

We are aware of but two instances under our State organization, in which similar resolutions have been passed, and in both cases replies were made declining to express any opinion upon the points submitted. *Journal of the Senate, 1858, page 718; Id., 1863, page 75.*

We might be justified in resting on these precedents. But we perceive that in neither case was the resolution considered by all the members of the Court; nor does either of the opinions given by the Judges cover the whole ground of the power of the Legislature and the Court under resolutions of this kind. We, therefore, deem it proper out of respect to the Senate, and in view of the important principles involved, to state briefly the reasons for the conclusions at which we have arrived.

By the Constitution the power of the State Government is di-

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vided into three distinct departments, legislative, executive and judicial. The powers and duties of each department are distinctly defined. The departments are independent of each other to the extent, at least, that neither can exercise any of the powers of the others, not expressly provided for. *Const., art. 3. sec. 1.*

This not only prevents an assumption by either department of power not properly belonging to it, but also prohibits the imposition, by one, of any duty upon either of the others not within the scope of its jurisdiction; and "it is the duty of each to abstain from and to oppose encroachments on either." Any departure from these important principles must be attended with evil.

This question is well considered in a note to *Hayburn's case*, 2 *Dall.*, 409, *et seq.* in which the Circuit Court for the district of New York, Jay, Chief Justice, says: "That neither the legislative nor the executive branches can constitutionally assign to the judicial, any duties but such as are properly judicial and to be performed in a judicial manner."

The duty sought to be imposed by the section of the act referred to, is clearly, neither a judicial act nor is it to be performed in a judicial manner. It constitutes the Supreme Court the advisers of the legislature, nothing more. This does not come within the provisions of the constitution, and, as the constitution now stands, would be, in our opinion, not only inconsistent with judicial duties, but a dangerous precedent. The impropriety of an unauthorized expression of opinion by a Judge or Court, especially one of last resort, upon a matter which may subsequently come before the Court for adjudication, will immediately suggest itself. If the statute under consideration is in conflict with the constitution it imposes no duty, and any opinion expressed in pursuance of action under it, is extra-judicial, and no official responsibility attaches to the Judge or Court voluntarily giving it. The evils which might result to the people from such a source will suggest themselves on a moment's reflection.

In all the instances to which we have had an opportunity of referring, where Courts have responded to resolutions of this character in other States, provision has been made therefor in the

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State Constitution. *Const. of Mass., Ch. 3, Sec. 2; Const. of N. Hamp., Sec. 74*; and of course in such case official responsibility attaches to the discharge of the duty, and thus one serious objection is removed. Although we confess that, for other reasons, such a constitutional provision does not address itself to our minds with any favor.

Whether under the Territorial organization the statute referred to could have been sustained, we need not consider, since only such territorial laws as are not inconsistent with the constitution, are preserved by the schedule to that instrument.

We are, therefore, unanimously of opinion that the section referred to authorizing the action of the Senate is unconstitutional and void, and therefore imposes no duty on the Court. And we are prevented from voluntarily complying with the request, by the views we entertain of our judicial duty and the injurious tendency of such a precedent.

We must, therefore, respectfully decline to comply with the request contained in the resolution.

CASPER H. SCHURMEIER vs. THE ST. PAUL AND PACIFIC RAILROAD
COMPANY et al.

In 1849 the United States by patent conveyed to Louis Roberts Lot one in Section five in Ramsey County, which lay on the left or northerly bank of the Mississippi River. The meander line of said lot was run along the left or northerly bank of a small channel or slough between said bank and a parcel of land subsequently surveyed by the government designated "Island No. 11." In very low water in the river, there was no current and very little water, and that in pools, in said channel or slough. At a medium stage of water in the river, the land designated "Island No. 11" was above water, and there was a current or flow of water through said channel or slough. In very high water in the river said Island No. 11 was inundated. At and prior to the time of pur-

chase of said lot by Roberts, the government plat kept in the local land office, which showed the boundaries and descriptions of the public lands, and in accordance with which sales were made, showed no islands in the river in section five or opposite said lot. *Held*—that the river and not the meander line was the boundary of said lot. That by the patent to Roberts the United States conveyed the title to the land, at least to low water mark—including that designated "Island No. 11."

After Roberts obtained title to said lot, he platted it into blocks, lots, streets, landing, &c., as a part of the town of St. Paul, and duly recorded his plat thereof. *Held*—that he retained in the land over which the streets and landing were laid, the fee, subject only to the use of the public for the purposes designated.

That the Legislature could not appropriate the land laid out into streets and landing for any other use, or subject it to any additional servitude without compensation to the owner of the fee. That the use by the Railroad Company of the landing or streets for a railroad track was unauthorized by the dedication or the law under which it was made.

That the Railroad Company having no legal authority to use the streets or landing for a railroad track, and such use being a special injury to the plaintiff, he is entitled to an injunction.

The plaintiff, claiming to be the owner of lots 11 and 12 in block 29, St. Paul, brought this action in the Ramsey County District Court to restrain the Saint Paul and Pacific Railroad Company, its agents and employees, from constructing and maintaining its railroad upon the street and levee in front of said lots, and which separate them from the Mississippi River.

Issue was joined in the action, the said Company claiming the right to so construct and maintain such railroad under and by virtue of the following statutes :

1. The act of Congress granting lands in alternate sections (sections of the odd numbers) to the Territory of Minnesota to aid in the construction of certain railroads therein, &c., passed March 3, 1857.

2. Chapter 1 of the act of the Legislative Assembly of the Territory of Minnesota to execute the trust created by the said act of Congress, and to grant certain lands to railroad companies therein named, passed May 22, 1857.

3. Amendment of section ten of article nine of the Constitution of the State of Minnesota, adopted April 15, 1858.

4. An act concerning Land Grant Railroads, passed August 12th, 1858, and an act in addition thereto passed the same day.

5. An act to facilitate the construction of the Minnesota and Pacific Railroad, and to amend and continue the act of incorporation relating thereto, passed March 10, 1862.

6. An act of Congress to grant the right of way to all rail and plank roads through the public lands of the United States, passed August 4, 1852.

7. An act to extend the provisions of the last above mentioned act to the public lands in the Territories of the United States, passed March 3, 1855.

The cause was tried before a Referee, who in his report finds the facts substantially as follows :

The premises in question are included in that part of section 5, Town 28, north of Range 22, west of Fourth Principal Meridian, which is situate on the left or north side of the centre line of the Mississippi River. The said part of section five, consists of two separate triangular parcels of land, one of which, lot two thereof, is situated in the northeast corner, and contains one and thirty-three-hundredths acres, and the other lot one thereof in the northwest corner of said section, containing nine and twenty-eight-hundredths acres, and including said lots eleven and twelve. A government survey of said part of said section five, was duly made October 27, 1847, and a map or plat of said section pursuant to such survey was duly prepared from the field notes and certified March 13, 1848, and was duly transmitted to the land office in the district in which such lands are situated ; said map does not indicate that there were any islands in the river in said section five, but does indicate an open river without islands, and that the meander line of said lot one was the border line of the Mississippi River. When this survey was made, the meander line of said lot one was run along the left or northerly bank of a small channel or slough between said bank and an island which appeared in said river, except in times of very high water. In very low water

there was no current and very little water, and that in pools, in said channel or slough; at a medium stage of water said island was above water, and there was a current or flow of water through said channel or slough, and in very high water said island was inundated; no mention of said channel or slough, or of said island, is made in the field notes of said survey, but such field notes show that the line that bounds lot one on the north runs east until it intersects the left bank of the river, at which point a post is set called a "meander corner"; that the line bounding said lot on the west runs south until it intersects the left bank of the river, at which point also a meander post is set. The meander line of the river between these points commences at the first above mentioned meander post and runs "*thence up stream*" (the courses and distances being given) to the last mentioned meander post.

Prior to March 24, 1849, Louis Roberts purchased said lots one and two of the United States, and on that day a patent therefor was duly issued to him, whereby the United States did give and grant to the said Roberts said lots, containing ten and sixty-hundredths acres according to the official plat and survey thereof. In the spring of 1849 said lot one was duly surveyed, laid out and platted into town blocks, lots, streets, &c., constituting a part of the town of St. Paul, and such plat was duly certified and recorded. The said survey and plat of said town included the land embraced in said lot one, and extended to the main channel of said river, without regard to the meander line of said lot; the said lots eleven and twelve in block twenty-nine are included in said plat and survey of said town, and are so designated by and upon such plat; the larger part of said lots eleven and twelve (about two-thirds) is situated south of the meander line of lot one in section five, extending across said slough, the front or southerly line of said lots being on said island. All that parcel of land lying between the front or southerly line of said lots eleven and twelve in said block twenty-nine, and the main channel of the said river, as well as the like space between the front line of the balance of said block twenty-nine and the blocks west of it, is on said town plat
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designated "Landing." On the 13th of March, 1856, the piece of land lying between the said channel or slough and the main channel of said river—said island—was surveyed under instructions from the Commissioner of the General Land Office, dated February 21, 1854, and such survey was duly approved, and a map thereof made and duly certified, and recorded September 24, 1856, upon which map said island is designated "Island No. 11." Prior to such survey of "Island No. 11," the city of St. Paul had, in grading the levee or landing between said block twenty-nine and the river, entirely filled said channel or slough at the upper or west end thereof, and extended the grade entirely across said "Island No. 11" to the main channel of the river. The surface of said island in its natural condition was about four feet lower than the main land. In 1860 or 1861 the plaintiff built a warehouse on the west side of said lot eleven, in block twenty-nine, extending entirely across said slough or channel, the larger part thereof being south of the meander line of said lot one, and the front or south end of said warehouse on said "Island No. 11," and about four feet back or north from the front or southerly line of said lot eleven. In erecting said warehouse, plaintiff fixed the elevation or level of the lower floor with reference to the grade of said levee or landing, as established by said city. Prior to the erection of said warehouse, the title in fee to said lots eleven and twelve passed from the said Louis Roberts through intermediate conveyances to the plaintiff, who at the time of the commencement of this action and the commencement of the railroad works hereinafter mentioned, was the owner thereof, and seized of the title thereof in fee, with the appurtenances, to the extent which Louis Roberts received the title thereto from the United States, and to the extent of his right and power to convey the same. Ever since the survey and plat of said town of St. Paul, the space between the main channel of said river and the town blocks fronting thereon, and designated on said plat as "Landing," has been used as a public landing or levee for steamboats and vessels touching at St. Paul, and plying between that place and other places on the Mississippi River and its tributaries, which landing includes the

space between said lots eleven and twelve, in said block twenty-nine, and the main channel of the river. In the fall of 1862 said Railroad Company entered upon that part of said landing or levee, lying between the plaintiff's warehouse and the main channel of said river, for the purpose of constructing their railroad track thereon for permanent and continued use, and were engaged in such work when this action was commenced. The defendants, other than said Company, were its employees, directing and doing said work, and since the commencement of this action such work has been completed. The said Company have raised the grade of said levee in the construction of their railroad, so that the top of the rails thereof is twenty-one and one-half inches higher than the lower floor of the plaintiff's warehouse, and the north rail of the track is fifty and three-tenths feet from the front wall of said warehouse. There are two tracks there on a level with each other, or nearly so, and the grade from the south side of the south track to the water is much steeper than the former grade of the levee between the plaintiff's warehouse and the water. The said railroad works of the said Company, and the use thereof, are an obstruction to the plaintiff in the use of his warehouse in connection with the navigation of the Mississippi River, and will continue to be such an obstruction so long as the said works shall there remain.

Although the plaintiff may derive benefit from the construction of said railroad, in common with the other owners of real property adjacent thereto, such obstruction is an injury personal to himself, and distinct from the injury (if any) to the public occasioned by the construction and use of said railroad on said levee. The whole of said railroad works of said Company, and of which the plaintiff has complained in this action, are located upon "Island No. 11" in said section five.

The Referee found as a question of law that the plaintiff was entitled to the relief demanded in his complaint, and in pursuance thereof a judgment was entered up in his favor, perpetually enjoining the defendants from constructing, maintaining and using

said railroad, &c., in front of said lots eleven and twelve. The defendants appealed from such judgment to this Court.

MASTERSON & SIMONS for Appellants.

I.—The lines run and marked by the Surveyor upon the bank of the Mississippi river, commonly called the “meander lines,” are the boundaries upon that side of the lands granted to Roberts and of all claiming under him.

1. It is a case of the sale of land by special metes and bounds, artificially run and marked upon the ground. *Act of Feb. 11th, 1805, Sec. 2, 2 U. S. Stats., 313, &c., (Land Laws, 119, &c.); 2 Barr., (Penn. State Rep.) 43; 4 Barr., 244; 10 Casey, (Penn. State Rep.) 198; Davis vs. Rainsferd, 17 Mass., 208; 13 Pick., 145; Jackson vs. Hathaway, 15 J. R., 447; Childs vs. Starr, 4 Hill, 369 and 373, and the cases there cited per Walworth; Bradford vs. Currey, 45 Maine, 9; Saunders vs. McCracken, Harden (Ky.) Rep., 258; Yaden vs. Swope, 3 Bibb., 204; Bodly vs. Kerndon, 3 Marshall, 21; Fleming vs. Keeney, 4 J. J. Marshall, 157; Mercer vs. Bates, 4 Id., 339; Bruce vs. Taylor, 2 Id., 160; Bates vs. Ill. Cent. R.R. Co., 1 Black., 204.*

The acts of Congress providing for the preservation of the *field notes* of the surveys, show that they are to be regarded as *calls for boundaries*, and that their purpose is not merely to furnish data for the computation of the quantity and price. *See act of 12th of June, 1840, 5 U. S. Stat., 384, and act of 22d of Jan., 1853, Secs. 1 and 2, 10 U. S. Stat., 152.*

There was no authority for the sale of the *locus in quo* at the time of Roberts' entry, because it had not then been surveyed and platted, or included in returns made to the General Land Office. See dissenting opinion of *Ch. J. Wilson, 2 Scam., 510.*

There was no authority to fix the price by one boundary, and sell by a different boundary. But the line by which the price to be paid by the purchaser is determined, is for that reason the line by which he shall hold his title. To hold differently is to invite fraud upon the Government.

2. If it is to be considered as a sale of lands bounded upon the river generally as a natural boundary, the result will be the same. Because the Mississippi river at the place in question, "is a deep and navigable public stream of water on which a large amount of commerce and trade are carried on." *See the plaintiff's complaint.* Therefore the grant would stop at the edge, and not go to the middle thread.

At common law a boundary upon a navigable stream, conveyed only to the edge at high water. The material fact in the eye of the law is navigability, and not what causes or proves it to be navigable. It is the quantity, not the quality, of freshness or saltiness, that is the material thing. If the navigability is disputed, the ebbing and flowing of the tide is strong *prima facie* evidence to support the fact of navigability; but it is not conclusive even as evidence, and as a test it was never anything more than a rule of evidence, as distinguished from a rule of right or property. Public use for the purposes of commerce was higher and more conclusive evidence of navigability in fact, which was the real question in law.

The rule in regard to the ebbing and flowing of the tide, like all rules of presumption, depends for its force upon its agreement, as a general rule, with the facts. In England this presumption is generally true in fact—it is probable. In this country the reverse is true and probable. The principle of the rule is to presume what is probable until the contrary is shown, and the law is the same in both countries in this, that in both countries we presume that which is probable. We adhere to the principle and reason of the law, and in order to do so have to reverse the presumption, because the facts in regard to our rivers are the reverse of those in England.

The reason of the common law limiting grants of land bordering navigable streams to the edge of them, is that public policy requires that land which ordinarily has no value except for use in connection with public commerce, and may come to have great value for that use, should not pass by grants upon the banks to private persons, but should be held by the public, or those to whom

it has been expressly granted by the public, for reasons connected with their interests. No other reason can be given why the grant stops at high water mark, and denies the ownership of the shore and portions covered by shallow water, to the riparian proprietor. For these parts cannot be used by vessels navigating, and are only valuable to erect commercial buildings and docks upon. The Mississippi is within the reason and policy of the common law rule as to tidal waters. *See* 1 *Cowper*, 86; 4 *Barn. & Cress.*, 598; 5 *Taunt.*, 706; *Woolrych's Law of Waters*, 62, 63, 64, and the cases there cited; *Opinions of Mr. Justice Bronson in Starr vs. Child*, 20 *Wend.*, 158, and the cases cited by him; 2 *Wharton*, 508; 2 *Binney*, 475; 14 *Sergt. & Rawle*, 71; 14 *Penn. State R.* 171; 10 *Casey's Penn. State Rep.*, 198; 3 *Clarke's* (8 *Iowa*.) *R.*, page 1 and cases there cited; 2 *Den.*, 30, 36; 4 *Hill*, 369, per *Walworth*; *Orendorf vs. Steele*, 2 *Barbour, Sup. Ct., N. Y.*, 126.

3. Whatever may be the strict common law rule, this case arises under the United States Land Laws, and is controlled by them; and by those laws the Mississippi is navigable in law, and grants of land bordering upon it are limited to the surveyed lines where there are any, and in their absence to the edge of the stream. *Act of May 18, 1796, Land Laws*, page 50, 1 *U. S. Statutes*, 464; *act of May 20, 1785, do. p. 11*; *act of June 1, 1796, do. p. 56*; *act of March 3, 1803, do. p. 98, sec. 17*; *act of March 26, 1804, do. p. 107, sec. 6*; *act of Feb. 11, 1805, do. p. 119-20, secs. 2 and 3, 2 Stats.*, 313; *act of April 24, 1820, do. p. 323-4, secs. 1 and 3, 3 Stats.*, 566; *act of March 3, 1847, 9 Stat.*, 179; *act of April 16, 1814, Land Laws*, 245, *Sec. 3*; *act of Feb. 27, 1815, do.*, 257, *sec. 1*; *act of April 16, 1816, do.*, 273, *sec. 2*; *do. April 27, 1816, do. 276, sec. 2*; *do. March 3, 1847, vol. 9, stats. at large, p. 691, or page 43 of private laws, same vol.*; *see also vol. 5, page 70, and vol. 10, pages 157 and 601*; *Child vs. Starr*, 4 *Hill*, 369; *Id.* 5 *Denio*, 599; 1 *Peters' C. C. Rep.*, 64; 4 *Mason's Rep.*, 349; 3 *Sumner*, 170; 6 *Mass.*, 435; 17 *Mass.*, 298; 13 *Pick.*, 145; 7 *Porter, (Ala.)* 428; 2 *Id.*, 436; 6 *Humph., (Tenn.)* 358; *Russell vs. Empire State*, 1 *Newberry*, 551; 6 *Miss.*, 219; *Walker's Ch. Rep.*, 155; 1 *Minn.*, 73; *Jones vs. Sculard*, 24 *How.*, 41; *Oren-*

dorf vs. Steele, 2 Barb. Sup. Ct. Rep., (N. Y.) 126; *Bates vs. Ill. Cent. R. R. Co.*, 1 Black., 204.

In every instance of the use of the term "navigable" in the land laws, it is used in the largest sense, meaning navigable in fact for the purpose of trade and commerce. Not an instance can be found of its use in the restricted sense of waters, where the tide ebbs and flows.

The same acts which provide for the survey, provide also for the sale of the lands and regulate the title, and the term "navigable" must be taken in the same sense, whether the question be one of survey, or of the extent of the title granted upon the survey.

The only authority given for deviating from the rectangular form of survey, and for making fractional sections on account of rivers, is because of their navigability rendering it "impracticable" to adhere to the usual mode. *Act of 1796*. If it is not for that reason "impracticable," the lines must be extended across the streams, and the square form adhered to, and the bed of the river included and to be paid for. If this reason did not exist in this case, the survey into a triangular form was illegal, and Roberts' title a nullity. If the river is not navigable in the sense of the term which the United States have adopted in the laws by which their lands are granted and titles interpreted, then the Surveyor had no more right to meander it than he would the smallest rivulet or even a prairie.

For the purposes of determining questions of titles and boundaries, the meandering of a river and not the ebb and flow of the tide, is the test or evidence of navigability.

The word "impracticable" in the land laws, (*see act of May 18, 1796, sec. 2; act of 1785 from which it is copied*), is not to be understood in the sense of physical impossibility or inconvenience, but in the sense of the impropriety of including within the bounds of the subdivisions offered for sale portions of land not intended to be sold, and the confusion which would arise from selling to private persons lands by boundaries, which included some lands the fee of which it was the design and policy of the law to retain

in the public. It is the same impracticability that there would be in extending the divisions and lines of the survey so as to include lands reserved for the use of the Indians; and the same impracticability that there would be in extending the lines so as to include land covered by tide waters, or the shore between high and low water. There was no other impracticability encountered. If "impracticable" is taken in the physical sense, it is encountered at the edge of the water.

It is in fact the same word which is used to reserve from sale the bed and shores of this same river in a part of its course—where it is affected by the tide. There is no other authority for reserving them anywhere in its course.

The use of the same word for rivers where there is a tide and those where there is not, shows an intention to reject the common law distinction. And this word being also used in connection with the Indian boundary line, and taken from the act of 1785, which made no reference to rivers, shows that the design was the exclusion of the soil from sale.

It is evident from the *9th section of the act of May, 1796*, that Congress did not consider the common law applicable, nor desire that it should be. For it adopts a rule unknown to that law for streams that are not navigable. *The act of March 3, 1847*, vesting in the city of Madison the strip of land between the meander line and the Ohio River, is a legislative construction put upon the existing laws of Congress, which should be followed in regard to all subsequent sales, especially as the act extending the land laws over the Chippewa Land District and the *locus in quo*, was passed the same day.

Whatever may be the common law interpretation of the words "to the water course," their meaning in the *2d sub. of the 1st sec. of the act of Feb. 11, 1796*, and similar requirements in other acts, is to the *edge*, and not the *middle*, because they are used in connection with and to carry out the requirement that the lines shall in all cases run *due* north and south, or east and west "to the water course," &c. Now, in many cases it is impossible, owing to the curvatures in the water courses, to do this if the

middle thread is intended, but is in all cases possible if the edge is meant. And this is so in the case at bar.

Even where it is possible to do it in one case, it would be at the cost of preventing the like right in an adjoining case.

It is evident from the plat of the original survey, that there was no intention of representing the whole river in its entirety, or the middle thread of it, as a boundary.

All boundaries are lines in the mathematical sense—length without breadth, where the intention is to represent a boundary as on or by a river generally, or the middle thread thereof. Either the whole river is represented as one line—not as a space between two lines, or the middle is represented by a dotted line.

In this case the river, though not represented by a single line, is platted and represented as having but one side, and therefore, no middle thread at all.

It is just such a map as we would expect when the intention was to represent the land as bounded by the edge instead of the centre.

And the certificate of the Surveyor General to the map, shows that it was intended to represent and describe only land lying upon the east side or left bank, and that it was strictly conformable to the field notes. That is, it is to be taken as a plat and representation of that land, and that only of which such field notes are the more particular description.

This is similar to the description in the deed of cession by Virginia to the United States of the territory on the north-west side of the River Ohio, and which was held not to carry the bed of the river or islands. *Handley's Lessee vs. Anthony*, 5 Wheaton, 379.

II.—If the *locus in quo* does not belong to the respondent, then the appellants are rightfully there, and justified in their acts. *Laws of Minnesota, Extra Session, 1857, page 3 and 2; Act of March 3, 1857, (Land Grant Act); do. August 4, 1852, 10 U. S. Statutes, 28; do. March 3, 1855, 10 do., 683; do. July 15, 1862; Rex vs. Smith, 1 Doug., 425; Gould vs. Hudson River R. R. Co., 2 Selden, 522; see also Sec. 3, Charter of the Co. Laws of 1857, page 4.*

III.—If Roberts by his Patent became the owner, then he parted with the fee of the *locus in quo*, by recording his town plat. *Statutes of Wisconsin*, 159, *Sec. 5*. And the public in whom the fee became vested have authorized its use by the R. R. Co. 2 *Smith's Leading Cases*, 186, and the cases there cited; 7 *Barbour*, (*Sup. Ct., N. Y.*) *Rep.*, 509; *B. Munroe*, 437; 6 *Wharton*, (*Pa.*) 43, &c.; *Statutes of Minnesota, Extra Session*, 1857, page 6, *Sec. 7*, (*Charter of the Co.*)

IV.—The respondent is not entitled to the remedy by injunction; but must resort to the remedy provided by the Charter of the Company, (*Section 13, Laws of 1857, Extra Session, pages 10 and 11.*) or to his general legal remedy.

The Court should presume that the remedy especially provided by the Legislature is adequate, until it has been tried or some facts are alleged from which the Court can infer that it would be useless to resort to it.

The Railroad in question is "a public highway for the use of the Government of the United States." *Act of March 3d, 1857, Secs. 3 and 5, U. S. Stats., Vol. 11, 195-6, and Charter of the Company.*

LORENZO ALLIS for Respondent.

I.—Inasmuch as the plaintiff owns the property in front of which the railroad is being constructed, and also the fee of the ground on which the defendants have entered and are erecting their works, he may enjoin them from thus appropriating and using his private property, unless just compensation therefor be first paid or secured to him. *Constitution of Minnesota, Art. 1, Sec. 13; Art. 10, Sec. 4; Constitution of the U. S., Amendments, Art. 5; Bonaparte vs. Camden and Amboy R. R. Co.*, 1 *Baldwin, C. C. Rep.*, 205, and cases there cited; *Bradshaw vs. Rogers*, 20 *Johns.*, 103; *Bloodgood vs. Mohawk and Hudson River R. R. Co.*, 18 *Wend.*, 9.

II.—But the respondent's suit is mainly a suit to abate a public nuisance. The right of an individual, who is specially injured by

a public nuisance—as the obstruction of the highway, or street, in front of his house or place of business, or other property—to an injunction at his own suit, is clearly established by the authorities. *See Humphreys & Terry vs. St. Paul & Pacific R. R. Co.*, now pending in the U. S. Circuit Court; see also, *Angell on Highways*, page 263, Sec. 283, and cases there cited; *Angell on Water Courses*, page 631, Sec. 571-2; 2 *Story's Eq. Juris.*, Secs. 920-9; *Angell on Highways*, page 199, et seq.; *Angell on Water Courses*, page 616, et seq.; *Soltau vs. De Held*, 9 *Eng. Law and Equity*, 104; *Corning vs. Lowerre*, 6 *Johns. Ch.*, 440; *Catlin vs. Valentine*, 9 *Paige*, 575.

In the case at bar there are two aspects, in which the acts and works of the defendants are a public nuisance:

1. The defendants are obstructing a public street.

The act of incorporation does not authorize the obstructions complained of and found by the Referee to exist in this case. *See Sec. 7 of said act.* There is no act of the Legislature authorizing these obstructions.

2. The defendants are obstructing a public landing on a navigable river.

Now it is not in the power of the Legislature of Minnesota, even if they were so disposed, to authorize these obstructions upon the public landing of a great national highway of commerce, like the Mississippi River. The people of Wisconsin, Iowa, Illinois, Missouri, and other States of the Union, have just the same interests and rights in the freedom of the navigation of this river, and the unobstructed use of its banks and public landings within this State, as the people of Minnesota. Any attempt, therefore, on the part of the people or the Legislature of Minnesota, to the exclusive use and occupation of the banks and landing places of this river, within the territorial jurisdiction of the State, would be futile and nugatory. If the several States could each within its jurisdiction assume the exclusive use and occupancy of the banks of the great navigable streams flowing through their Territory, or could grant such exclusive use and occupancy to others, there would be an end to the freedom of the navigation of these streams. In fact they

would no longer be navigable streams, as the acts of Congress explicitly declare that they shall be, and as the highest tribunal of the country has frequently adjudicated that they are. *Constitution of the U. S., Art. 4, Sec. 2*; *Ordinance of 1787, Art. 4, last clause*; *Act of Congress of 18th May, 1796, Sec. 9*; *1 Stat. at Large, 468*; *Brightly's Dig., page 500, Sec. 232*; *Russell vs. Brig Empire State, 1 Newberry, 541*; *Genesee Chief, 12 How., 443*; *Corporation of Memphis vs. Overton, 3 Yerg. (Tenn.), R., 389.*

It is therefore confidently submitted that in no contingency can the obstructions, which it is found the defendants have put upon the public landing in front of the plaintiff's property, ever be other than a public nuisance; and that therefore the plaintiff must at all times have the right to his remedy by injunction to remove these and all similar obstructions.

In this aspect of the case, it is wholly immaterial who owns the fee in this public landing: whether it be the plaintiff or the defendants. Whoever may be the owner of the fee, the ground itself is subject to the easement of a public landing on a navigable stream, and also that of a public street or highway. Any obstruction to the free use of such public landing and street, by whomsoever erected, is a public nuisance, and any individual specially damnified thereby may have the aid of a Court of Equity to abate the same.

The defendants' claim, therefore, to the ownership, whether equitable or legal, of the ground upon which they have entered and erected the obstructions complained of, will avail them nothing as a defence to the relief sought by the plaintiff.

III.—But the defendants are not the owners, nor in any wise entitled in the lands upon which they have entered.

The patent to Roberts, under whom the plaintiff claims, conveyed all the land bounded on the north by the east and west sectional line, and on the west by the north and south sectional line, and on the only other remaining side, by the water course,—that is, the Mississippi River.

In the U. S. Government Surveys the boundaries are the north

and south, and east and west lines of the Sections and Townships, and in the case of fractions, also the natural or exterior object which causes the fraction—as a water course, Indian Territory, &c. The monuments are the section posts and quarter section posts.

The “meander lines” are not boundaries. They are not even known to the laws or acts of Congress. The term “meander” is simply used to designate certain lines run by the Surveyors along the windings of water courses bounding fractions, for the purpose of ascertaining and returning the quantity of land in such fractions.

The acts of Congress explicitly define “monuments,” and provide where they shall be placed.

They are to be set down at the township, section and quarter section corners.

And these acts provide that from these monuments all lines shall be run, north or south, and east or west, until other like monuments or their places shall be reached, or until some water course or other exterior object intervenes.

There is no provision whatever for meandering a water course, or running any line along its bank, or the thread of its stream. But the quantity of land in a fraction must be returned; hence the Surveyor runs lines along the bank of the water course, to determine the quantity of land in the fraction. *Brightly's Dig.*, p. 466, *Sec. 41*; *Id.* page 493, *Sec. 208*; *Lester's Land Laws*, page 709.

If the Surveyor make an error in his return as to the quantity of the land, or if the quantity is erroneously stated in the Patent, this will not affect the grant. The grantee will take according to the boundaries of the land described. *Lindsly vs. Hawes*, 2 *Black.*, 554.

The survey, including the maps, plats, field notes and certificates returned into the Land Office, and pursuant to which the grant is made by the Patent, is a matter of record and of equal dignity with and a part of the Patent. *See case last above cited; also*

Bouv. Dict., Vol. 2, page 566, term "survey"; and authorities there cited.

The government is concluded by the survey according to which the grant is made. Any subsequent survey of the land by the government made after the grant, is void and without effect as to the grantee. *Lindsly vs. Hawes*, 2 *Black.*, 554; *Bates vs. Ill. Central R. R. Co.*, 1 *Black.*, 204.

So any survey not made in pursuance of the acts of Congress is void. *Lessee of Brown vs. Clements*, 3 *Howard*, 650.

It is clear, therefore, that Roberts under his Patent took all the land lying between the sectional lines and the Mississippi River; that his Patent "calls" for the Mississippi River as one of the boundaries of his grant.

It is beyond question that a call for a river or water course as a boundary, is a call for the thread of the stream or centre of the channel; and hence that such Riparian Proprietor owns to the thread of the stream, subject however to the easement of navigation by the public, when the river or water course is navigable.

Boundaries designated as "up" or "down" the river, or "along" the river, or "by" the river, mean the thread of the river or the centre of the channel. Boundaries running to the river or to the bank of the river run to the thread or centre of the channel of the river.

A river, or water course, when used as a boundary, is used as an entirety. *Angell on Water Courses*, Chaps. 1 and 13; *Middleton vs. Pritchard*, 2 *Scammon*, 510; *Ex parte Jennings*, 6 *Cowen*, 518 and note p. 536; *Gavit vs. Chambers*, 3 *Ohio*, 496; *Newson vs. Pryor's Lessee*, 7 *Wheat.*, 7; *Jones vs. Soulard*, 24 *Howard*, 63; *Bates vs. Ill. Central R. R. Co.*, 1 *Black.*, 204; 3 *Kent*, p. 427, *Lecture 52, Subdivision 2*, (2) "*Riparian Rights*."

IV.—No fact appears showing that the defendants are in any wise entitled in the *locus in quo*.

It does not appear that the conditions of the grant have been complied with; especially those contained in *Sec. 4 of the act of Congress of the 3d of March, 1857*, 11 *Stat. at large*, page 196.

It does appear, however, from the statutes of this State, and the pleadings, that the defendants have no capacity to take the land in question, nor to become in any wise entitled in the *locus in quo*. The defendants claim their corporate existence and their consequent right to proceed under the land grant of Congress, by virtue of an act of Legislature, approved 10th of March, 1862. *Session Laws, 1862, page 247.*

It was not competent for the Legislature at that time to establish a corporation by special act; and hence this act was unconstitutional and void. *Constitution of Minnesota, Art. 10, Sec. 2.*

By the Court—WILSON, C. J.—The laws governing the surveys and descriptions of the public lands, to which it is necessary to refer in this case, are found in an act approved May 18, 1796, entitled "An act providing for the sale of the lands of the United States in the Territory north-west of the Ohio River, and above the mouth of the Kentucky River," in an act approved May 10, 1800, amendatory of the aforesaid act, and in an act approved February 11, 1805, entitled "An act concerning the mode of surveying the public lands of the United States." By these acts it is provided that the public lands shall be subdivided into townships of six miles square, sections of one mile square, and quarter sections, and that these subdivisions shall be bounded by north and south and east and west lines, unless where this is rendered impracticable by meeting a navigable water course, Indian boundary line, or the line of a tract of land before surveyed or patented. It is also provided that the rule of bounding by north and south and east and west lines, shall be departed from no farther than such particular circumstances require. By section 2 of the act of 1805, above referred to, it is provided "that the boundaries and contents of the several sections and quarter sections of the public lands of the United States, shall be ascertained in conformity with the following principles: * * * * The boundary lines actually run and marked in the surveys returned, shall be established as the proper boundary lines of the sections or subdivisions for which they were intended, and the length of such lines as

returned shall be held and considered as the true length thereof; and the boundary lines which shall not have been actually run and marked as aforesaid, shall be ascertained by running straight lines from the established corners, to the opposite corresponding corners; but in those portions of the fractional townships where no such opposite corresponding corners have been or can be fixed, the said boundary lines shall be ascertained by running from the established corners due north and south or east and west lines, as the case may be, to the water course, Indian boundary line, or other external boundary of such fractional township." The fractional townships are to be surveyed and sold with the adjoining townships, and it is to be observed that in the survey of such fractional subdivisions, the lines must run to the water course, (when the township is made fractional by a water course,) and such water course is by the act designated as the *external boundary* of the fractional township. No law that we are aware of in terms requires the "meandering" of water courses, but the acts of Congress above referred to, require the contents of each subdivision to be returned to, and a plat of the land surveyed to be made by the Surveyor General. This makes necessary an accurate survey of the meanderings of the water course—that is the boundary of a fractional subdivision—and the line showing the place of the water course and its sinuosities, courses and distances is termed the meander line. The field books, therefore, necessarily show the water course to be the boundary of the tract or subdivision, and the plat should, and in this case does, correspond with the field books. In this case the correctness of neither could in this respect be questioned. *Bates vs. Ill. Cent. R. R. Co.*, 1 *Black.*, 204.

In March, 1849, the United States conveyed to Roberts lot one in question. At and prior to that time the government plat kept in the local land office, which showed the boundaries and descriptions of the public lands, and in accordance with which sales were made, showed no islands in the river in section five, or opposite lot one. The river at this point is navigable in fact, but being above the flow of the tide it is not deemed navigable in law. One question in the case is, whether the grant by the government to

Roberts of lot one conveyed to him the island, so called, now claimed by the defendants.

The Referee found as a matter of fact, that at the time when the government survey of lot one, in section five, was made, "The meander line of said lot was run along the left or northerly bank of a small channel or slough between said bank and the parcel of land which is designated 'Island No. 11.' That in very low water in the river there was no current and very little water, and that in pools in said channel or slough; and that at a medium stage of water the land designated 'Island No. 11' was above water, and there was a current or flow of water through said channel or slough, and that in very high water in the river the said land designated 'Island No. 11' was inundated."

The defendants' counsel claim that the meander line, and not the river, is the boundary of said lot one. This view is not sustained by the entries in the field books, by the government plat, or by the law in accordance with which the survey and sale were made. The entries in the field books show that the line that bounds lot one on the north, runs east until it intersects the left bank of the river, at which point a post is set called a "meander corner,"—that the line bounding said lot on the west runs south until it intersects the left bank of the river, at which point also, a meander post is set. The meander line of the river between these points commences at the first above mentioned meander post, and runs "*thence up stream*" (the courses and distances being given) to the last mentioned meander post. There is no such thing as a meander line in such case distinct and separate from the line of the river. It is merely an accurate survey of the river, and neither party in this case could be permitted to show that the river is in a different place from that designated by the field book and plat. *See Bates vs. Ill. Cent. R. R. Co.* above cited. The plat shows the river as the boundary, and the law as we have above seen, requires the boundary lines of such lot on the other two sides to run to the river, and designates the river as the boundary of the third side.

We think, therefore, that it is too clear to admit of a reasonable
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doubt that the river bounds this lot on one side. But this being admitted, the further question is presented, whether the riparian owner takes to high water or low water mark, or to the middle thread of the stream.

At common law grants of land bounded on rivers above tide water carry the exclusive right and title of the grantee to the middle thread of the stream, unless an intention on the part of the grantor to stop at the edge or margin is in some manner clearly indicated; except that rivers navigable in fact are public highways, and the riparian proprietor holds subject to the public easement. In this case no intention is in any way indicated to limit the grant to the water's edge, and if the common law rule prevails here, Roberts, by his purchase, took to the centre of the river, including the land subsequently surveyed by the government—called Island No. 11—and which is now claimed by the defendants. The common law of England, so far as it is applicable to our situation and governments, is the law of this country in all cases in which it has not been altered or rejected by statute, or varied by local usage under the sanction of judicial decisions. 2 *Kent's Com.*, 27-8. We think, in respect to the rights of riparian owners, it is as applicable to the circumstances of the people in this country as in England. It is not true in fact, as has been alleged, that the navigability in fact of a river above the flowing of the tide is a state of things unknown to or unprovided for by it. See *Hale, Treatise De Jure Maris, &c.*, part 1, Chap. 3. In its application to cases like the one under consideration it has not been varied or rejected in this State, and the few States of the Union that have repudiated it are exceptions to the general rule. See *Jones vs. Soulard*, 24 How. U. S. R., 41, and case cited in brief of counsel of defendant in error; *Govett vs. Chambers*, 3 Ohio, 496; *Middleton vs. Prichard*, 3 Scammon's, 510; *Ex parte Jennings*, 6 Cowan, 518, and note; *Palmer vs. Mulligan*, 3 Oaine's Reps., 318, and note; 3 *Kent's Com.*, 427, et seq. and cases cited in note; 2 *Smith's Leading Cases*, 217-227; *Angell on Water Courses*, chap. 1, and cases cited; 2 *Washburne's Real Prop.*, 632, and notes.

Some—we believe most—of the authorities that deny that the riparian proprietor owns to the middle thread of the stream, hold that he takes to the *low water* mark. See *Halsey vs. McCormick*, 13 *N. Y. R.*, 296; *Morgan vs. Ready*, 2 *Smeade's & M.*, 366; *Childs vs. Starr*, 4 *Hill*, 396; *Blanchard vs. Porter*, 11 *Ohio*, 138; 2 *Smith's Leading Cases*, 224-6, and cases cited.

This we think would include the land claimed by the defendant, and designated "Island No. 11." We hold, therefore, that by the patent to Roberts, the U. S. conveyed to him said "island."

We think no reason can be given why the same rule should not apply to grants made by the Government that are applicable to grants made by individuals. Section 9, of the act of Congress, first above cited, provides that all navigable rivers within the territory to be disposed of by virtue of that act, shall be deemed "to be and remain public highways." At common law rivers navigable in fact are public highways, and the riparian owner holds subject to the public easement. This act of Congress, therefore, is merely a declaration or affirmation of the common law, and not a modification of it.

The fact that these rivers are, and must remain public highways, is not at all inconsistent with the view, that riparian owners have the fee of the bed of the stream. *Peck vs. Smith*, 1 *Conn.*, 133.

The defendants' counsel argues that even if Roberts by his purchase from the government became the owner, he afterwards by the record of his plat, parted with the fee of that portion laid out into streets and landing, and that by sec. 7 of chap. 1 of the laws of the extra session of 1857, the legislature authorized the use of said streets by the Railroad Company. The statute of Wisconsin under which the plat of this portion of St. Paul was recorded, reads as follows: "When the plat or maps shall have been made out and certified, acknowledged and recorded as required by this act, every donation or grant to the public or any individual, religious society, or any corporation or body politic, marked or noted as such on said plat or map, shall be deemed in law and in equity a sufficient conveyance to vest the fee simple of all such parcels as therein expressed, and shall be considered to all intents and pur-

poses, a general warranty against such donors, their heirs and representatives to the said donee or grantee for his use, for the uses and purposes therein named, expressed and intended, and for no other use and purpose whatever; and the land intended to be for the streets, alleys, ways, commons or other public uses in any town or city, or addition thereto, shall be held in the corporate name thereof in trust to and for the uses and purposes set forth and expressed or intended."

A dedication is not a grant or donation. Its effect is not to deprive a party of title to his land, but to estop him, while the dedication continues in force, from asserting a right of possession inconsistent with the uses and purposes for which it was made. *Hunter vs. Trustees of Sandy Hill*, 6 Hill, 407, *Cincinnati vs. Lessee of White*, 6 Pet., 432-438.

If, therefore, the corporate authorities of the town of St. Paul acquired the fee simple of the land over which the streets are laid, it must have been by virtue of the statutory provisions above cited.

But we think an examination of the statute will not lead to the conclusion that it operated as a conveyance of the complete title.

The first clause of the section refers to "*donations or grants marked or noted as such in the plat,*" and we think has no reference to the land to be used for streets, landing, &c. As to the lands marked on the plat as granted or donated, the statute declares that this shall be deemed in law and in equity, a sufficient conveyance to vest the fee simple; but as to the lands intended for streets and alleys, the language is not that a fee simple shall pass, but that it "shall be held in the corporate name in trust to and for the uses and purposes expressed or intended."

The change of phraseology is quite significant. In the latter case we think it is manifest that the intention of the statute was not to pass the fee simple, but merely such an estate or interest as the purposes of the trust required. The use for which the dedication was made, therefore, determines the extent of the right parted with by the owner and acquired by the public or corporate authorities of the town. Neither the use for which the dedication was made, nor the language of the statute justifies, in this case, the

conclusion that a legislative transfer of the fee was intended, and without such transfer, it remains in Roberts and his grantees. See 2 *Smith Leading Cases*, 215.

The plaintiff, therefore, as grantee of Roberts had an interest and property in the streets and landing opposite lots 11 and 12 which could not, without compensation, be taken for public use or subjected to any greater burden or servitude than was expressed or intended by the dedication under said statute. The use of the streets and landing by the Railroad Company for a railroad track is, manifestly, not such a use as the dedication or statute contemplated or authorized, and we think, it admits of much doubt whether the legislature intended to give the defendants such a license.

The authorization by the legislature of such use would be an interference with the reserved rights of the plaintiff, and an attempt to authorize the taking of private property for public uses without compensation. See *Redfield on Railways*, 2d Ed., 158-165, Sec. 14, and notes and cases cited in notes; *Williams vs. N. Y. Cent. R. R. Co.*, 16 N. Y., 97; *Tate vs. Ohio & Miss. R. R.*, 7 Port. (2d,) 499; *Haynes vs. Thomas*, Id., 38.

But even if it was held that by the record of the plat, the corporate authorities of the town of St. Paul acquired a complete title to the land over which the streets and landing are laid, it cannot be doubted but that the transfer was made to them on the consideration and express condition that the land should be used for and *as streets and landing only*, for the use and benefit of the public generally, and particularly for the use and benefit of the owners of adjacent lots.

If, by this act of the Legislature the town authorities acquired the streets and landing for the public use, by the same act they were bound to dedicate and hold them solely to and for the uses expressed.

The original donor gave the property, and every subsequent purchaser of the lots fronting on the streets or landing purchased on the condition and with the understanding and implied agree-

ment, that the streets and landing should forever be kept open for his use, benefit and enjoyment.

This gave to the adjacent lots their principal value. It would therefore seem that the original owner and subsequent purchasers obtained a property and vested right in the streets and landing. *See Tate vs. Ohio and Mississippi Railroad, and Haynes vs. Thomas, cited above.* If this is so, then the plainest dictates of justice, as well as the express provisions of our Constitution, would require that the property should not be taken or injuriously affected without compensation.

The Railroad Company having no legal authority to obstruct the streets or landing, and such obstruction being a special injury to the plaintiff, we think he has a right to the relief prayed for.

We think the conclusions of the Referee in the case are correct, and that the judgment below should be affirmed.

BERRY, J.—I agree with the following conclusions arrived at in the foregoing opinion :

1. That lot number one extended to the water's edge at low water mark, including the parcel of land designated as Island No. Eleven.

2. That the landing extended to the same line.

3. That Schurmeier by his purchase of lots eleven and twelve as platted, acquired at least an easement in the landing which could not be impaired for public use without compensation.

4. That the corporate authorities of St. Paul acquired by the plat and the recording thereof, not the fee of the landing, but only such estate or interest as was necessary to support the uses and trusts for which they held it.

5. That the railroad structures, &c., complained of, are an obstruction to the free use and enjoyment of the easement aforesaid, and constitute a private nuisance as respects Schurmeier, entitling him to an injunction.

As to the other conclusions arrived at I express no opinion, but concur in the disposition made of the case.

NATHAN C. D. TAYLOR vs. JOSHUA L. TAYLOR et al.

The Legislature by an act approved March 3, 1863, provided (subject to the approval of the electors of the county) that the county seat of Chisago County should be removed from Taylor's Falls to Chisago City, and said law was submitted at the next general election to the electors of said county for their adoption, in pursuance of *Sec. 1, Art. 11 of the Constitution*. In certain towns in said county at said election the Judges and Clerks of election did not take the prescribed oath, or any oath, and no list of qualified electors was kept as required by law, and in one town one of the Judges of election was a candidate for Representative to the State Legislature. *Held*—that notwithstanding such errors and irregularities on part of the officers of the election, it was the duty of the County Canvassing Board to canvass the returns from said towns, and their certificate was *prima facie* evidence of the result of the election. The burden of proof was on the contestant to show that the errors complained of affected the result or rendered it uncertain.

If the votes of the citizens are freely and fairly deposited, at the time and place designated by law, the intent and design of the election are accomplished. It is the will of the electors thus expressed that gives the right to the office, or determines the question submitted, and the failure of the officers to perform a mere ministerial duty in relation to the election, can not invalidate it if the electors had actual notice and there was no fraud, mistake or surprise.

If the officers of election fail to perform their duty the law provides a penalty, but the election is not *necessarily* rendered void.

The object of requiring the "points" of contest to be stated, is for the purpose of informing the adverse party of the grounds of contest, so that he may prepare to meet them and may not be taken by surprise; each party to a contested election is therefore required when he becomes actor to give notice of the *specific* grounds on which he intends to assail either the election or the correctness of the returns or canvass.

Sec. 1, Art. 11 of the Constitution requires only (for the adoption of such law) a majority of the electors present and voting at such election.

When the literal interpretation of an instrument involves any absurdity, contradiction, injustice or extreme hardship, the Courts may deviate a little from

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the received sense and literal meaning of the words, and interpret the instrument in accordance with what may appear to have been the intention and meaning of its framers, and the real intention, when accurately ascertained, must in all cases prevail over the literal sense of the terms.

The meaning of particular words in statutes, as well as other instruments, is to be found not so much in the strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used and the object that is intended to be attained.

As a general rule it is the duty of every elector to attend and vote at the general elections, and the law presumes that every citizen does his duty. In the eye of the law, therefore, those present and voting at such election constitute the electors of the county.

The constitutional debates can not properly be resorted to as aids in the construction of the constitution.

This is a proceeding under the provisions of *sec. 56 of chapter 15 of the Laws of 1861*, contesting the validity of an election held at a general election on the 3d day of November, 1863, submitting to the electors of Chisago County, for their approval or rejection, the question of the removal of the county seat of that county from Taylor's Falls to Chisago City, in pursuance of an act of the Legislature of the State of Minnesota, approved March 3, 1863. The plaintiff, an elector of said county, served a notice of such contest upon the County Commissioners of said county, (the defendants), which was verified December 3, 1863, and filed in the office of the Clerk of the District Court for said county December 22, 1863, wherein the points upon which such election would be contested are set forth substantially as follows: That said county is divided into seven organized townships—Chisago Lake, Franconia, Sunrise, Wyoming, Taylor's Falls, Amader and Rushseba; that in four of said townships, to-wit, Chisago Lake, Franconia, Sunrise and Wyoming, at said election some or all of the following irregularities occurred: the persons acting as Judges and Clerks of election did not take and subscribe the oath or affirmation required by law; no lists of the qualified electors of the election district were kept, and none transmitted with the returns to the Auditor of said county as required by law; and that

in the township of Franconia one Ansel Smith, who was at the time a candidate for the office of Representative to the State Legislature, acted as one of the Judges of election; that by reason of said irregularities the election returns transmitted to the Auditor of said county from said townships were fraudulent and void; that the Board of Canvassers of said county accepted and canvassed said returns, and included the same in making their computation of the number of votes cast in favor of and against the removal of said county seat; that by so doing the number of votes in favor of said removal was increased 192, and against said removal 19; that by reason thereof the abstract of the votes cast in favor of and against said removal, prepared by said Board, is erroneous and void; that by including the vote of said four townships, said Board of Canvassers counted two hundred and nine votes in favor, and one hundred and forty-six against said removal, as the aggregate vote of said county on said question; that a majority of the votes cast on the question of the removal of said county seat were cast against said removal.

Said notice further sets forth that the entire number of qualified electors in said county exceeds 486; that rejecting the returns from the townships Chisago Lake, Franconia, Sunrise and Wyoming, the election returns on file in the office of the Auditor of said county show only seventeen cast in favor of said removal; that said removal has not been approved by a majority of the electors of said county. The relief prayed for in said notice is, that by the judgment and decree of the Court Taylor's Falls be declared the county seat of Chisago County.

One of the qualified electors of said county appeared in said proceeding, and demurred to the said notice on the ground that "it does not contain a statement of facts sufficient to entitle the contestant to the relief demanded."

The demurrer coming on to be heard at the October general term of the Chisago County District Court, was overruled by the Court and Taylor's Falls adjudged to be the county seat of said county.

From the order overruling said demurrer and the judgment thereon, the defendants appeal to this Court.

L. E. THOMPSON for Appellant.

H. N. SETZER for Respondent.

By the Court—WILSON, C. J.—The Legislature by an act approved March 3, 1863, provided (subject to the approval of the electors of the county) that the county seat of Chisago County should be removed from Taylor's Falls to Chisago City. *See Session Laws* 1863, p. 204.

The law was submitted at the next general election to the electors of said county for their adoption, in pursuance of *Sec. 1, Art. 11 of the Constitution*. The county canvassing board, to whom the returns of the election were made, declared and certified that said law was adopted by a majority of the electors.

The plaintiff, being a resident and qualified elector of the county, thereupon gave notice that he would contest the validity of the election, and for that purpose commenced this action. *See Laws of 1861, p. 118, sec. 56*. To the notice the defendants demurred, and the demurrer was overruled and judgment rendered for the plaintiff in the Court below, and the defendants appeal to this Court.

The points or grounds of contest set out by the plaintiff are: (1) that the election returns from four townships of said county were invalid on account of a non-compliance with the election laws by the officers of the election, and (2) that, admitting the returns to be valid, still a majority of the electors of said county did not vote in favor of the removal.

Under the first head the plaintiff specifies several irregularities or errors which he claims render void the returns from and the election in several towns, and the canvass of the county canvassing board.

It is not very apparent whether the plaintiff by this proceeding

attempts to attack the returns, the canvass, or the election, but we take it for granted that he attacks the election, as well as the canvass and returns, this view being most favorable to his case.

The plaintiff in his notice of contest states that he "contests the validity of the said election, and specifies the following points on which said election will be contested to-wit :

"For the first point the said Nathan C. D. Taylor alleges that the county of Chisago is divided into seven organized townships, to-wit: Chisago Lake, Franconia, Sunrise, Wyoming, Taylor's Falls, Amador and Rushseba. That after the last general election there were transmitted to the County Auditor of Chisago County certain papers purporting to be the election returns of the township of Chisago Lake aforesaid. That the said papers are in truth and in fact no election returns, but are fraudulent and void, for the reason the persons pretending to be the judges and clerks of said election did not take and subscribe the oath required by law, nor any other oath or affirmation whatever, and for the farther reason that no list of the qualified electors of the election district composed of said town of Chisago Lake was returned or enclosed or transmitted with the said papers purporting to be the election returns of the town of Chisago Lake, and that it appears from the papers aforesaid that there were no register poll lists at said supposed election whatever."

Some or all of these errors are alleged to have existed and rendered void the returns from the towns of Franconia, Sunrise and Wyoming; and in Franconia it is alleged that Ansel Smith, who was a candidate for the office of Representative to the State Legislature, acted as one of the judges of election.

It was undoubtedly the duty of the county canvassing board to canvass the returns. *Sec. 43, chap. 15, of the Laws of 1861*, under which the election was held, provides that "no election returns shall be refused by any Auditor for the reason that the same may be returned or delivered to him in any other than the manner directed in this act; nor shall the canvassing board of the county refuse to include any returns in their estimate of votes, for any informality in holding any election or making returns thereof."

Here the duty of the Auditor and canvassing board is plainly pointed out. It was not competent for them to undertake to decide whether the errors or irregularities complained of invalidated the election in the towns named. That was a question for judicial, not for ministerial officers—a question that could only be decided by a court that could call in witnesses, hear evidence and decide questions of law and fact.

Irrespective of the above statutory provision, it is quite clear that this question could not properly be decided by the canvassing board. See *O'Farral vs. Colby*, 2 Minn., 180.

The canvassing board, therefore, we think acted correctly in canvassing said returns, and their certificate is *prima facie* evidence of the facts therein stated and certified to. But that certificate is only *prima facie* evidence, and the District Court in which this action was brought can go behind it and inquire as a matter of fact whether the canvass was fairly conducted, and whether the result of the election is truly set forth in the certificate; but the burden of proof is on the contestant (plaintiff) to show that there were irregularities *and that they affected the result*. *Whipley vs. McKune*, 12 Cal., 352; *People vs. Cook*, 4 Selden, 67; 14 Barb., 259; *Lanier vs. Gallatus*, 13 La. An. R., 175; *State vs. Mason*, 14 Id., 505; *Bashford vs. Barstow*, 4 Wis., 567.

The facts stated in the notice being admitted by the demurrer, the question presented is whether these errors or irregularities rendered *void* the election in said towns. It will be observed that fraud is not charged, nor is it alleged that any illegal votes were polled or that any legal votes were excluded.

The law requires the judges of election to take the prescribed oath and to keep register poll lists, and forbids a candidate at such election to act as one of the judges, but it is in no place provided that a failure to comply with the law in any of these respects shall make void the election. The public good demands that the will of the people as expressed at the ballot box should not be lightly disturbed. There is hardly an election held in any county at which in some town irregularities do not occur, and to declare

every such election void would work a manifest hardship and injustice. If the votes of the citizens are freely and fairly deposited at the time and place designated by law, the intent and design of the election are accomplished. It is the will of the electors thus expressed that gives the right to the office or determines the question submitted, and the failure of the officers to perform a mere ministerial duty in relation to the election can not invalidate it if the electors had actual notice and there was no mistake or surprise. See *People vs. Cook*; *Shepley vs. McKune*; *Lanier vs. Gallatus*; *Bashford vs. Barstow*; *State vs. Mason*; *Gorham vs. Camp*, 2 Cal., 835; *Andrew vs. Lanier*, 13 La. An. R., 301; *State vs. Elwood*, 12 Wis., 551; *People vs. Fease*, 13 E. P. Smith's R.; *Carpenter vs. Ely*, 4 Wis., 420; *In the Matter of the Mohawk and Hud. Riv. R. R. Co.*, 19 Wend., 143.

The plaintiff's counsel in his argument admits that as a general principle of law, statutes directing the mode of proceeding of public officers are merely directory, *unless there is something in the statute itself which plainly shows a different intent*, and refers to section 4 of the *Election Law*, which, after prescribing the duty of the town clerk to post notices of the time and place of holding the election, adds: "Provided that no failure of any clerk to give notice of any election as aforesaid shall invalidate any election."

The exception in this section he insists shows the intention of the law to invalidate an election for the disregard of any other prescribed formality or duty by the officers, applying the maxim, "*Expressio unius est exclusio alterius*."

This is a principle or rule of logic as well as a maxim of the law of very extensive practical application, both in the construction of written instruments and verbal contracts, but great caution is requisite in its application. *Broom's Maxims*, 595; *Eastern Archipelago Co. vs. The Queen*, 2 Ellis & B., 856-879; *Price vs. Great Western R. C.*, 16 M. & W., 244.

The application of this maxim in this case seems forced and unauthorized.

The rule of law has long been well settled that the failure of the

officers of an election (as in this case,) to perform their duties strictly as required by statute, does not invalidate the election.

It is certainly true as a matter of fact, and presumed to be true as a matter of law, that the Legislature knew this rule ; and we must suppose that if they had intended to change a rule of law of such practical importance, they would have done so directly and in unequivocal terms.

By the provision in section 4 of the election law (above quoted,) the law on that subject is not changed.

The statute requiring that notice was directory, and the validity of the election did not depend upon the notice, (*People vs. Hartwell*, 12 Mich. R. ; *Marchant vs. Langworthy*, 6 Hill, 646,) and it is a maxim of the law that "*Expressio eorum qui tacitae insunt nihil operatur.*" If on account of the aforementioned errors in the election, the result of the vote was rendered uncertain in the towns designated, perhaps the returns from those towns should be rejected.

Or if the election was attacked for fraud on this account, and it should appear that the errors were caused by a party interested, that perhaps would be *prima facie* evidence of fraud requiring satisfactory explanation. But as we above stated, the person attacking the canvass must in every case show that there was error, and that that error affected the result or rendered it uncertain. The plaintiff has not pretended to do either in this case.

It is not necessary for us to particularize in this case. All the errors complained of under the first head, fall within the same principle, and are covered by the authorities cited. If the officers of the election have failed to perform their duty the law provides a penalty ; but the officers only can be punished, they alone having erred.

After specifying particularly the errors above referred to, the plaintiff adds: "And the said Nathan C. D. Taylor alleges that a majority of the votes cast on the question of the removal of the county seat from Taylor's Falls to Chisago City, were cast against the removal of the said county seat of Chisago county."

This we think was intended merely as an inference or conclusion

from the facts before stated; because on the argument plaintiff's counsel did not claim that this was a sufficient statement of the ground on which the election was contested. If this had been deemed sufficient, no more minute or elaborate statement would have been made. But whether plaintiff's counsel regarded this a sufficient statement, it is not necessary here to inquire; if sufficient in the eye of the law it is admitted by the demurrer, not otherwise. The statute requires that a notice shall be given "expressing the points on which the same (the election) will be contested."

The object of requiring the "points" of contest to be stated is manifestly for the purpose of informing the adverse party of the *grounds of contest*, so that he may prepare to meet them and may not be taken by surprise. Section 51 of the election law, (*Laws* 1861, *page* 115,) reads as follows: "No testimony shall be received by the justice on the part of the person contesting the election, which does not relate to the point specified in the notice. * * * Provided, That a party whose election is contested may give to the contestant a like notice as provided in Sec. 49 of this act, (section above quoted,) and thereupon the introduction of testimony shall be likewise confined to the specifications contained in said notice." A specification here clearly implies an enumeration of particulars; not a statement so general that the ground of contest cannot be inferred from it.

This case is a good illustration of the insufficiency of such a general statement. The statement that the majority of votes cast were against the removal, gives not the least intimation of the grounds of contest or of any of them. We think, therefore, that in this class of cases each party to the contested election, when he becomes actor must give notice of the *specific* grounds on which he intends to assail either the election or the correctness of the returns or canvass.

By silently passing over the objections to the form of the notice in this case, we do not wish to be understood as tacitly deciding that those objections are untenable. The view which we have

taken as above expressed, renders unnecessary a consideration of those objections.

The Court below we think correctly held that on the first ground of contest, specified in the notice, the demurrer was well taken.

We now come to the second ground of contest. The plaintiff states in his notice: "That it appears from the election returns of the last general election of the towns of Taylor's Falls, Amador and Rushseba that the aggregate number of qualified electors in said towns is 236; that the number of qualified electors in the town of Wyoming is 96. That the said Taylor of his own knowledge cannot state the exact number of qualified electors in the townships of Chisago Lake, Franconia and Sunrise, and that no election returns in said towns are on file in the County Auditor's office, from which such number can be precisely ascertained; but said Taylor avers that the aggregate number of electors in said three last mentioned townships exceeds 154. That the entire number of qualified electors in the county of Chisago exceeds 486. That the election returns in the office of the County Auditor, rejecting the fraudulent papers in the first point of this notice set forth, show only 17 votes cast in favor of the removal of the county seat to Chisago City aforesaid, and that the question of the removal of the county seat * * * has not been adopted by a majority of the electors of said county."

This point involves a construction of Sec. 1, Art. 11 of the Constitution, which is in the following language: "And all laws changing county lines in counties already organized or for removing county seats, shall before it takes effect be submitted to the electors of the county or counties to be affected thereby at the next general election after the passage thereof, and be adopted by a majority of such electors." The plaintiff claims that this section requires an absolute majority of those qualified to vote in the county at the time of the election.

This construction is perhaps in accordance with the letter of the Constitution, but it leads to such practical inconvenience, hardship and absurdity, we cannot believe it to be in accordance with the spirit and meaning of that instrument.

It will be observed that the returns of the canvassing officers would not be even *prima facie* evidence of the result of such election, for such returns could only show the numbers voting and the result of the vote. In every case it would be necessary, if this construction is correct, to show by legal evidence the actual number of persons legally qualified to vote in the county at the time of such election, and we are unable to see how this could be determined except by a suit or proceeding in a Court qualified to decide authoritatively and finally such questions. The difficulty of making such proof in many cases would be so great as to make it impracticable.

It is not claimed that Courts have anything to do with the propriety or expediency of a law, or that they can correct what they may deem either excesses or omissions in legislation, or relieve against the occasionally harsh operation of statutory provisions; their duty is only to interpret the *will* of the framers of the instrument, to be construed by exploring their *intentions* at the time when the instrument was framed.

When a particular construction of an instrument leads to hardship, inconvenience or absurdity, the respect due from Courts to a co-ordinate branch of the government or to a constitutional convention, will not permit them readily to presume that such construction was intended, and they will under such circumstances a little deviate from the received sense of the words, not because they have a right to disregard the will of the framers of the instrument, but for the purpose of truly arriving at and carrying out their will.

The authorities sanctioning this course are so numerous we can only refer to a few of them. The law in New York in 1814, provided that "it shall not be lawful for any sheriff or any other officer to whom any such execution shall be directed, or any of their deputies or any person for them or either of them, to purchase any goods or chattels, lands or tenements at any sale by virtue of any execution, and all purchases so made by them shall be void."

At the time of the sale hereafter referred to, Schofield was deputy sheriff and plaintiff in the execution, and Wadhams purchased
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for his use. Savage, Ch. J., in delivering the opinion of the Court, says: "Admitting as the plaintiff does that Wadhams purchased for the use of Schofield, the purchase comes within the letter of the act; but it could never have been the intention of the Legislature to prevent a deputy sheriff, when plaintiff in an execution, from bidding in order to secure his money. The object was to prevent abuse—that the sheriff or his deputies should not be allowed to become purchasers at their own sales and thereby be induced to conduct corruptly in relation to them, but surely it was never intended to place these persons in a worse situation than others as to the collection of their own demands. Whenever the intention of the makers of a statute can be discovered, it ought to be followed with reason and discretion in the construction of the statute, although such construction seem contrary to the letter of the statute." *Bac. Ab., Tit. Statute, (I) 15 Johns., 380, per Ch. J. Thompson.* A thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers. This proposition is fully established and illustrated by the cases cited on the part of the plaintiff." *Jackson vs. Collins, 3 Cowen, 89.*

In delivering the opinion of the Court in *Donaldson vs. Wood, 22 Wend., 396*, the Chancellor says: "Legal hermeneutics, when applied to the construction of statutes, teach us to reject a construction which is contrary to natural justice and equity, or which will be necessarily productive of practical inconvenience to the community, unless the language of the law-giver is so plain and explicit as not to admit of different construction. To give a correct interpretation to the legislative will, when a statute was intended to remedy the injurious operation of a previous rule or principle of law, the Court should place itself in the situation of the Legislature which passed the statute; that is, to contemplate in the first place the law as it previously existed and the necessity and probable object of the change, and then give such a construction to the language used by the law-makers in providing the remedy as to carry their intention into effect, so far as it can be ascertained from the terms of the statute itself."

In *6 Hill*, 616 (*Watervleit Turnpike Co. vs. McKean*) the Court uses the following language: "There are other well established principles and maxims for the interpretation of statutes which lead to the same result. Every statute ought to be expounded, not according to the letter, but according to the meaning. *Qui haeret in litera haeret in cortice. Dwarriſ on Statutes*, 690. And the intention is to govern, although such construction may not in all respects agree with the letter of the statute. *Plowd. Rep.*, 205. Constructions of statutes are to be made of the whole acts according to the intent of the makers, and so sometimes are to be expounded against the letter to preserve the intent." *The King vs. The Bishop of London*, 1 *Show.*, 491; *Bac. Ab. Tit. Statute (I) pl. 5*, *Sir Wm. Jones' Reps.*, 105. "The meaning of the words of an act of Parliament is to be ascertained from the *subject* to which it refers." 3 *Bing.*, 193, *per Best, Ch J.* "The reason and object of a statute are a clue to its true meaning." *Dwarriſ on Stat.*, 696.

A Massachusetts statute declared all usurious mortgages *utterly void*. In deciding a case arising under this statute the Court in *Green vs. Kemp* say: "Although by the statute of 1793 all mortgages on usurious considerations are declared to be utterly void, yet it never could have been intended that a stranger might enter on the mortgagee or commit a trespass on the land and justify himself under the statute when all parties interested in the title should be disposed to acquiesce in the contract. The statute must have a reasonable construction and in conformity to its general object, which, was to protect debtors from the enforcement of unconscionable demands. A mortgage on a usurious consideration is therefore void only as against the mortgagor and those who may lawfully hold the estate under him."

When a statute gave treble damages against any person who should commit waste on land pending a suit for its recovery, the Court held that the act did not apply to a party wholly ignorant that any suit was pending, saying: "We can hardly suppose the Legislature intended to punish so severely a trespasser wholly ignorant of the pending of the suit. The statute is highly penal

and should therefore be limited in its application to the object the Legislature had in view." *Reed vs. Davis et al.*, 8 *Pick.*, 516, 517. The statute of Massachusetts exempts from execution among other things "one swine." The question being whether under the statute a swine when killed is protected from execution, Parker, Ch. J., in delivering the opinion of the Court, says: "The question presented in this case is more curious than difficult, for if we are to be governed at all by the manifest intention of the Legislature in making the exemption of a swine from liability to attachment or execution, we must give the exemption effect in the present instance. What could have been intended but the sustenance of a poor family by the exemption? To give the strict construction contended for on the part of the defendant, would be to convert the intended benefit into an injury, for the swine would be protected until it became fit for food and then be at the mercy of the creditor.

"It is said that statutes in derogation of the common law are to be construed strictly. This is true, but they are also to be construed sensibly, and with a view to the object aimed at by the Legislature." *Gibson vs. Jenny*, 15 *Mass.*, 205. And see also—*Hart vs. Cleis*, 8 *John.*, 41; *U. S. vs. Fisher*, 2 *Cranch.*, 386; *McDermut et al. vs. Lorillard*, 1 *Edw.*, 273; *Donnell vs. Hall*, 4 *Com.*, 140; *Edwards vs. Dick*, 4 *B. & Ald.*, 212; *Simpson vs. Unwin*, 3 *B. & Adol.*, 134; *Atkinson vs. Fell*, 5 *Macle & S.*, 240-41; *Wilbur vs. Crane*, 13 *Pick.*, 284; *Pease vs. Whitney et al.*, 5 *Mass.*, 380; *Murray's Lessees vs. Baker*, 3 *Wheaton*, 541; 1 *Black. Com.*, 60-61-87; 1 *Kent's Com.*, 460-2; 9 *Bac. Ab.*, (*Bouv. Ed.*) 246-7-8, (*Title Statute I*, 5 and 6); *Lieber's Hermeneutics*, 144, *id.* 168; *Bristol Hospital vs. Norton*, 11 *M. & W.*, 928; *Turner vs. S. & R. Railway Co.*, 10 *M. & W.*, 434; *The King vs. Hall*, 1 *Barn. & Cress.*, 136-7; *Matteson vs. Hurb.*, 14 *Com. Bench R.*, 385; *Abley vs. Dale*, 11 *Com. Bench R.*, 390; *McDougall vs. Paterson, Id.*, 769; *Warburton vs. Loveland*, 1 *Hudson & Brooke*, 648.

The rule deducible from these authorities would seem to be this: when the literal interpretation of an instrument involves any

absurdity, contradiction, injustice, or extreme hardship, the courts may deviate a little from the received sense and literal meaning of the words, and interpret the instrument in accordance with what may appear to have been the intention and meaning of its framers, and the real intention, when accurately ascertained, must in all cases prevail over the literal sense of the terms. This rule should certainly be applied with much caution, for while it is doubtless true that in the interpretation of constitutions, statutes, or other written instruments by the courts, a strict adherence to the mere letter would render our system practically intolerable, yet a loose and careless mode of interpretation is attended with the most serious dangers. The rules applicable in the construction of constitutions are not different in this respect from those that govern in the construction of statutes. *Sedgwick on Stat. and Con. Law*, 491-2-3.

In seeking for the intention of the Legislature, there are certain rules that have been accumulated by the experience and ratified by the approbation of ages, which we may safely follow, for that rule or law that has been tried by time has the highest possible evidence in its favor.

Blackstone in his Commentaries, *Vol. 1, page 60*, says: "The fairest and most natural method to interpret the will of the legislator, is by exploring his intention at the time when the law was made by signs the most natural and probable, and these signs are either the words, the context, the subject matter, the effects and consequences, or the spirit and reason of the law." * * *

"As to the effects and consequences, the rule is that where the words bear either none or very absurd signification if literally understood, we must a little deviate from the received sense of them. * * * But lastly, the most universal and effectual way of discovering the true meaning of a law, when the words are ambiguous, is by considering the *reason* and *spirit* of it, or the cause which moved the legislator to enact it."

The illustration given under this last rule, shows plainly that its application is not to be confined to those cases where the language literally understood conveys no definite meaning, but on the con-

trary that it should also be applied in cases where the words, according to their literal signification, convey a definite meaning; but one which is evidently not in accordance with the *reason* and *spirit* of the law. *See also 1 Black. Com.*, 87.

Let us apply these cardinal rules of interpretation to this case.

Before the enactment of our constitution it was a ground of general complaint throughout the territory, that the Legislature frequently changed county lines and removed county seats against the will and contrary to the interest of those to be immediately affected thereby.

By the section of the constitution above quoted, perhaps it was intended to provide a remedy for this evil. At any rate it was manifestly the intention of the constitutional convention by this section, to forbid such removal or change except when sanctioned by the electors of the counties to be immediately affected, and it is also manifest that the convention did not by this section intend to withhold from the Legislature the power to make such change or removal, when desired by the electors of such counties. The section, therefore, seems to have been inserted in the constitution solely for the benefit of the counties to be affected by the change or removal; their interest only being guarded by it, and their will being the only restraint on the power of the Legislature.

A literal construction of the above quoted section as we have seen, involves great hardship and absurdity, and therefore, according to the rule of interpretation above quoted, we should a little deviate from such construction.

The *reason* and *spirit* of this constitutional provision, we have also seen, is not to forbid or render difficult or impracticable the change of county lines or removal of county seats, except when such change or removal is not desired by the counties to be immediately affected; but the construction claimed by the plaintiff would make such change impracticable at least in many cases, and very difficult and expensive in all. Such construction, therefore, though in accordance with the letter, is repugnant to the spirit and meaning of the constitution.

It is to be observed that the constitution requires such law to be

submitted to the electors at a "*general election*." The returns of the officers show the actual number of persons present at such election *voting on any question*. As a general rule it is the duty as well as the privilege of every elector to attend and vote at such election.

The law presumes that every citizen does his duty, and in the eye of the law those present and voting at such election constitute the electors of the county.

This construction effectuates the purpose of the framers of said section, and makes it speak a sensible and consistent language, and we think therefore it is the true one.

The meaning of particular words in statutes as well as in other instruments, is to be found not so much in the strict etymological propriety of language nor even in popular use, as in the subject or occasion on which they are used, and the object that is intended to be attained. *R. vs. Hill*, 1 B. & C., 123-136.

No reason was here given why an absolute majority should be required, nor has a precedent been cited of a single instance in any State, where such absolute majority is required, and we think no such reason could be given or precedent cited.

We have only been able to find two cases where Courts have construed language substantially the same as that of this section of our constitution, and neither of these cases sanctions the construction claimed by plaintiff.

In Tennessee an act of the Legislature provided as follows: "That neither of the said County Courts shall so take stock (of a R. R. Co.) until the question of the taking of the same shall first have been submitted to the voters of the county which it is proposed shall subscribe stock, and a majority of such voters shall have decided in favor of taking the stock proposed," and farther, "that whenever a majority of the voters of either of the above named counties shall decide in favor of the proposition that the county shall take the stock proposed, it shall be the duty of the County Court," &c. The Court in construing this language say: "The question made is whether this act requires a majority of all the legal voters residing in the county at the time of the election,

or only a majority of those who may attend the polls and actually vote. We are referred to the latest state and county elections to show the number of votes in the county, and then to the vote on this question to prove that the number of affirmative votes fall very far short of a majority of the legal voters of the county, though they exceed by several hundred the negative votes. How can we know how many legal voters there are in a county at any given time? We can not judicially know it. If it were proven that the vote was much larger at the last preceding political election, or by the last census by the official returns, or the examination of the witnesses, it would only be a circumstance, certainly not conclusive that such was the case at the time of the election.

But we put our decision on that question on a more fixed and stable ground. When a question or an election is put to the people and is made to depend on the vote of a majority, there can be no other test of the number entitled to vote but the ballot box. If in fact there be some or many who do not attend and exercise the privilege of voting it must be presumed that they concur with the majority who do attend, if indeed they can be known at all to have an existence. Certainly it would be competent for the Legislature to prescribe a different rule. But when they simply refer a question to the decision of a majority of the 'voters of a county,' it cannot be understood that they mean any thing more than those who see fit to exercise the privilege. Great inconvenience would result from the opposite rule. Suppose the vote should be very close, one, two, or a dozen majority one way or the other, how could the fact be ascertained but by the box of the exact number entitled to vote. It cannot be presumed that this or any other question submitted to the people was intended to be involved in such embarrassment." *Louisville and Nashville R. R. Co. v. Co. Court of Davison Co.*, 1 *Smeed's Rep.* 690.

In *People ex rel. Mitchell vs. Warfield*, 2 Ill. 159, Court say: "The law for the relocation of the county seat of Saline County, under which the election was held, was not as broad as the requirements of the constitution authorizing a relocation of county seats. That provision requires that a majority of the voters of

the county shall vote for the change. The law only requires the clerk to canvass the votes cast on the question of relocation, and certify the result, without regard to other votes cast at the same election. Beyond this in that certificate he is not authorized to go. Therefore under that law he can give no certificate which will afford legal evidence that a majority of the voters of the county have voted for one place or the other. His certificate, therefore, cannot afford legal evidence that the county seat has been changed under the provisions of the constitution. * * *

The statute itself can not be sustained under the constitution if we adhere to its literal expressions, for it requires in order to relocate the county seat but a majority of the votes cast on the question of relocation, whereas the constitution goes farther and requires a majority of the voters of the county. The law may be sustained by reading it in the light of the constitution and construe it as giving effect to the affirmative vote, when such affirmative vote is by a majority of the legal voters of the county. The Legislature may have assumed, and doubtless did, that all would vote on the question, and such is the practical effect if we count the votes in the negative, which are silent on the subject. This portion of the constitution must receive a practical construction. We understand it to assume—and such we believe was the understanding of its framers—that the voters of the county referred to were the voters who should vote at the election authorized by it. If we go beyond this and inquire whether there were other voters of the county who were detained from the election by absence or sickness or voluntarily absented themselves from the polls, we should introduce an interminable inquiry and invite contests in elections of the most embarrassing and baneful character, if we did not destroy all of the practical benefits of laws passed under these provisions of the constitution.

“We hold, therefore, that a majority of the legal votes cast at this election, is sufficient to determine the question of a re-location of the county seat.”

The plaintiff's counsel claims that his view of the question is supported by section 2 of said article of the constitution, which is vol. x.—17

in the following language: "The Legislature may organize any city into a separate county when it has attained a population of twenty thousand inhabitants, without reference to geographical extent, when a majority of the electors of the county in which such city may be situated voting thereon shall be in favor of a separate organization." He argues that the difference in phraseology shows a difference in meaning. The difference in the language of these sections is quite apparent, (so also is the difference in meaning,) but the inference therefrom as to the proper construction of section 1 is not legitimate. Section 2 requires only a majority of those voting on the particular question submitted under that section. Section 1 requires a majority of those voting at the *general election* at which the particular question is submitted. For illustration: at a general election a law is submitted for adoption or rejection. In the county in which such law is voted on, 2,000 votes are polled, but only 1200 on the question of the adoption of said law.

If the law is submitted under section 1, a constitutional majority would be at least 1,001; if submitted under section 2, 601 would be a constitutional majority.

It is also urged that the debates in the convention that framed the constitution, show that the construction claimed by plaintiff is the correct one.

If such debates could ever properly be resorted to as aids in interpretation, it seems quite obvious that such rule could not properly be followed in this case. The convention that framed this constitution divided on the first day of the session, forming two organizations, and afterward a joint committee of each reported a constitution that each wing adopted, and which is now the constitution of our State. As well might we resort to the debates in a committee room, as to the debates of either wing of said convention to show what was meant by the language used in the constitution. But we think such debates should not influence a Court in expounding a constitution in any case. See *Eakin vs. Raeb*, 12 *Serg. & Rawl.*, 352; 3 *How. U. S. R.*, 1; *Sedgwick on Stat. and Con. Law*, 489; *Ib.*, 241; *Bank of Pennsylvania vs.*

Commonwealth, 7 Penn. State Reps., 144; *The Southwark Bank vs. The Commonwealth*, 26 Penn. State Reps., 446.

Even if the plaintiff's position was correct as to the construction of this section, the demurrer was well taken. It will be observed that the election was held on the 3d day of November, and the notice of contest was drawn up and verified on the 3d day of December, one month after the election. The plaintiff does not allege directly or indirectly that there were *at the date of the election* in said county any greater number of electors than actually voted, or at least that the number of those not voting would have changed the result of the vote (even according to his construction of the constitution,) on the question of the removal of the county seat.

It appears that there were 209 votes cast for the removal—146 against it—making in all 355. Plaintiff alleges that "there are" (were at the date of notice,) in the county over 486. An increase of 131 in the voting population of a county in one month is not unprecedented in Minnesota.

The plaintiff's allegation, therefore, does not make a case for him according to his own interpretation of the constitution.

The judgment of the Court below is reversed and cause remanded for farther proceedings.

BERRY, J.—*Dissenting*.—There are several doctrines advanced by the majority of the Court in the foregoing opinion to which I find myself unable to assent. Two only will be particularly referred to, and that briefly. In the first place, I dissent from the position that a valid election can be held without the use of poll lists.

It is true that under our system of government the right of suffrage is one of great value and importance. But it is not like the right to breathe. It is a right conferred and regulated by law, either organic or statutory. And while it is of great importance to the individual elector that in the exercise and enjoyment of this right he should not be embarrassed by the requirement of useless forms, it is just as important to the rest of the community

that he should exercise his right in such manner as to ensure purity of elections according to some general and practical rule. The Legislature of this State has determined that the registration of persons entitled to vote and the use of poll lists at elections are proper and necessary regulations of the exercise of the right of suffrage. And, in my judgment, for this Court to say that these regulations are not necessary to be observed—that they are merely directory—that an election is as good and valid without them as with them, is virtually to override the express will of the Legislature. It is equivalent to saying to the Legislature that notwithstanding you deem such requirements necessary to protect the ballot box from fraud, we think otherwise, and that too when the subject is one of purely legislative cognizance. It is said that in the interpretation of laws we are to look for the *intention* of the law-maker. Can it be contended that when the Legislature for the very purpose of preventing frauds, and affording facilities for their detection, have prescribed certain express and explicit rules, in accordance with which elections shall be conducted, that it was the *intention* to make the observance of those rules a matter of indifference? Or that an election conducted in entire disregard of such rules should be as valid to all intents and purposes as one which complies strictly with the law? I think not.

I also differ with the majority of the Court as to the construction of that part of the constitution relating to proceedings of this nature. *Sec. 1, Art. 11*, declares that “all laws * * * for removing county seats shall, before taking effect, be submitted to the electors of the county to be affected thereby, * * * and be adopted by a majority of such electors.”

The plain natural meaning of this provision is that the law must be adopted by a majority of the *actual electors* of the county, and I am unable to agree with the reasoning through which the majority of the Court arrive at the conclusion that the clause “*a majority of such electors*” means a majority of those who *vote* at the election. If it be true, as claimed, that the law presumes “that every citizen does his duty,” it occurs to me that this principle (if it have any existence) could hardly apply here. If the

exercise of the right of suffrage be a duty, it is rather a moral than a legal duty; and as a matter of fact any presumption that every elector who is entitled to vote does vote, is against all experience.

A studied difference of language implies difference of intention, especially when the passages of an instrument in which the difference occurs are contiguous. There are several places in the constitution in which it is provided that certain things may be accomplished by vote of a majority of the electors *voting thereon*. One of these is referred to in the majority opinion in this case. It relates to change of county lines, and is found in the section immediately succeeding the section under consideration. See also *Secs. 1, 2, Art. 14; Schedule, Secs. 18, 22*. But a careful inspection of the constitution will show that the section in question furnishes the *only* instance in which it is required that the proposition submitted shall be adopted by a majority *of the electors*. This difference appears to me to be significant. But it is urged that to put this construction upon the constitution would be to render it inoperative in this respect.

That is a matter to be addressed to the people who make constitutions. If it be true that in adopting the constitution they have adopted a provision which will not work in practice, it would not be the first mistake of the kind on record. And even if the doubtful paternity of our constitution would render any reference to the constitutional debates illegitimate as *authority* upon the question of construction, it is certainly proper to refer to them for the purpose of showing that it was possible for some members of the convention to put the construction for which I contend on this provision without being aware that it would render it of no practical value, and to show that it might possibly have been the *intention* to make the removal of a county seat dependent on the will of a majority of *all the electors* of the county affected, without looking ahead far enough to see that there was no way to ascertain who or how many all the electors were. And an examination of these debates (*see Minn. Con. Debates, 472*) shows that the position taken while the matter was under discussion in the

Sibley Convention, and which seems to have been acquiesced in, was that this provision required not only a "majority of all the electors who vote, *but of all the electors of the county.*"

If it be admitted that a fair and natural interpretation of this part of the constitution would render it inoperative, I should much rather rest on this conclusion than to attempt to make it operative by a *forced* construction, or by the interpolation of words which were not inserted by its framers, and which would seem to have been left out by design. The only effect of the adoption of my view in this case would be to render county seats immoveable, which would be a light misfortune compared with the damage done to the constitution by a latitudinarian construction. If the practical immoveability of county seats be oppressive, the constitution can be amended.

But I am unable to perceive that even in my view of the matter, as above expressed, the part of the constitution under examination would necessarily be inoperative. It is probably quite true that at the time when the constitution was adopted no way was provided for ascertaining officially the number of legal voters. But that matter was for all purposes under the control of the Legislature. It was in their power to establish by express legislation a reasonable rule of evidence on the subject. I think there is no difficulty now. For it is made the sworn duty of the judges of election to make out a list of electors, and this list is subject to revision and correction down to the hour when the polls are opened. Under the familiar rule by which a public officer is presumed to have done his duty, these lists, made as they are for the very purpose of ascertaining who is entitled to vote, and that too by authority of law, would be at least *prima facie* evidence of the number of voters. And even without any such evidence as the lists furnish, it is clearly possible and practicable to ascertain the number of voters in a given county, though the attempt may be attended with much labor and inconvenience. And it will be found that in some other cases our Legislature have enacted laws which are based upon the practicability and necessity of ascertaining the actual number of voters within a given district, and

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that too without the opportunity of ascertaining this number by the holding of an election or by a reference to poll lists. *Laws* 1862, *chap.* 67, *p.* 137; *Id.*, *chap.* 68, *sec.* 1, *p.* 138.

It is true that there are abundant authorities which give great latitude to judicial interpretation. Many of these are cited in the majority opinion in this case. Many of them are commented on by Mr. Sedgwick, in his work on Constitutional and Statutory Law, and the general condemnation which he passes upon them is supported with great force of argument. See *chap.* 7, *Sedg. on Con. and Stat. Law.*

And I conclude by quoting on this point a few sentences from the opinion delivered by that distinguished jurist, Mr. Justice Bronson, in *Oakley vs. Aspinwall*, 3 *Com.*, 547. "My rule has ever been," he says, "to follow the fundamental law as it is written, regardless of consequences. If the law does not work well the people can amend it, and inconveniences can be borne long enough to await that process. But if the Legislature or the Courts undertake to cure defects by forced and unnatural constructions, they inflict a wound upon the constitution which nothing can heal. One step taken by the Legislature or the Judiciary in enlarging the powers of government, opens the door for another, which will be sure to follow; and so the process goes on until all respect for the fundamental law is lost, and the powers of the government are just what those in authority please to call them."

JOHN PIERCE VS. T. R. HUDDLESTON.

Under the United States Internal Revenue law of 1862, a writ of certiorari was not subject to a stamp duty.

This is an appeal from an order of the District Court of Dakota County dismissing the action.

A sufficient statement of the case appears in the opinion of the Court.

T. R. HUDDLESTON, Appellant in person.

CLAGETT & CROSBY for Respondent.

By the Court—WILSON, C. J.—This case was commenced before a Justice of the Peace, and after judgment removed by a writ of certiorari into the District Court of Dakota county. In the District Court the counsel for the plaintiff “moved that the action be dismissed on the ground that the writ of certiorari had not affixed thereto a revenue stamp as required on writs of original process.” The motion having been allowed and the action dismissed, the defendant appeals to this Court.

The only question in the case is whether the writ of certiorari was subject to a stamp duty. The writ was issued and the case decided while the revenue law of 1862 was in force. That law provided that “writs or other original process by which a suit is commenced in any Court of record,” should be subject to a stamp duty of fifty cents. This is the only provision of that act by which it is claimed a stamp duty is imposed on a writ of certiorari. By the express terms of this section its operation is confined to “original process,” which is defined by the statute to be the means *by which a suit is commenced*. A writ of certiorari does not fall within this definition or description, and therefore is not subject to a stamp duty.

The order appealed from is reversed.

CATHARINE NININGER vs. THE BOARD OF COUNTY COMMISSIONERS
FOR THE COUNTY OF CARVER.

The fact that an action is not commenced in the proper county is not an error that deprives the Court of jurisdiction, or that can be reached by demurrer.

When a married woman sues for her separate property, her husband is not a necessary party, plaintiff or defendant.

From the allegation (admitted by the demurrer,) that the "defendants executed in due form of law and issued" the bond in question, it will be presumed that they executed it in the mode required by law.

The plaintiff having alleged that she purchased the bond on which the suit is brought, and our law authorizing her to make purchases of this kind, it will be presumed that the purchase was for herself and not for her husband, and with money that was her separate property.

This action was commenced in the Ramsey County District Court by the plaintiff, a married woman, who sued by her next friend, to collect of the defendant certain interest coupons which were attached to and made a part of a certain bond of the county of Carver. The allegations of the complaint which are material to the points decided are, "that the defendants being thereto duly authorized, executed in due form of law and issued, and for value delivered" the bond in suit to one George Fuller; it sets out the bond "*haec verba*," signed by the Commissioners of said county, attested by the clerk of the Board of Commissioners, with its seal attached. It further alleges that the officers signing and attesting the same were duly elected, qualified and acting officers of said county, &c., &c.; "that said George Fuller in the usual course of business, negotiated, sold and delivered the said bond and the coupons thereto attached for value, and in the usual course of business, and for value paid and in good faith, the plaintiff purchased

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and received said bond and coupons, and is now the lawful owner and holder thereof."

The defendant demurred to said complaint upon the following grounds:

"1. That it does not appear on the face of the complaint, that this Court has jurisdiction of either the defendant or the subject of the action, but on the contrary it does appear that this Court has no jurisdiction of either the defendant, or the subject of the action.

"2. That it appears from the face of the complaint that the plaintiff, Catharine Nininger, has no legal capacity to sue for the cause of action alleged therein.

"3. That it appears from the face of the complaint that there is a defect of parties plaintiff in this, to-wit: that John Nininger is a necessary party plaintiff in said action for the cause alleged in the said complaint, and also in this, to-wit; that the said Catharine Nininger is not a proper party to said action for said alleged cause.

"4. That the said complaint does not state facts sufficient to constitute a cause of action."

The demurrer was overruled by the Court below, and the defendant appealed to this Court from the order overruling the same.

J. A. SARGENT and A. G. CHATFIELD for Appellant.

BRISBIN & WARNER for Respondent.

By the Court—WILSON, C. J.—If it was admitted, as claimed by the defendants' counsel, that this action was not commenced in the proper county, the error would not deprive the Court of jurisdiction, and would not therefore be reached by this demurrer. *See Merrill vs. Shaw*, 5 *Minn.*, 148.

Nor is the objection well taken that the husband of the plaintiff should have been made a party in this action.

When a married woman sues for her separate property the husband is not a necessary party, plaintiff or defendant. *Compiled*

Statutes, 535, section 30; *Furlong vs. Griffing*, 3 *Minn.*, 204; *Hollingsworth vs. State*, 8 *Ind.*, 257; *Gee vs. Lewis*, 20 *Ind.*, 149; *Darby vs. Callahan*, 16 *N. Y.*, 71; *Spees vs. Accessory Transit Co.*, 5 *Duer*, 662.

The language of the complaint is that the "defendants executed in due form of law and issued" the bond on which the action is brought.

The execution of the bond being a traversable fact is admitted by the demurrer. When the performance of an act is alleged, it will be presumed to have been in the mode required by law until the contrary appears. The objection to the complaint, therefore, that it does not show that the commissioners executed the bond at a legal session of the board, can not be sustained.

It is also objected to the complaint that it does not show that the plaintiff purchased with money that was her separate property, and not the property of her husband.

This objection we think is not tenable. Under our statute the plaintiff was authorized to purchase and hold such property. She alleges that she did purchase. This is an allegation of a fact, and is admitted by the demurrer.

If it is denied that the plaintiff purchased the bond in question, it will be incumbent on her to prove that fact, and when a married woman sues for her separate property without joining her husband as plaintiff or defendant, she should be held to very strict proof of the fact that the property belongs to her and not to her husband. See *Stanton vs. Kirsch*, 6 *Wis.*, 339; *Gamber vs. Gamber*, 18 *Penn. State R.*, 363; *Weymouth vs. Ohio & N. W. R. R. Co.*, 17 *Wis.*, 551.

But this is a question of evidence and not of pleading. If the defendant has a right to be informed of the particular facts which constitute the chattel in question her separate property, the remedy is by motion. A demurrer will not reach such defect. *Spees vs. Accessory Transit Co.*, 5 *Duer*, 662.

The plaintiff having alleged that she purchased, and our law authorizing her to make purchases of this kind, it must be presumed that the purchase was legal and valid. When it is stated

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generally in a pleading that an agreement or contract was made, the Court will presume it was legal until the contrary appears. *Cozine vs. Graham*, 2 Paige, 177.

It is farther objected that the County Commissioners had no power to make or issue said bond. This very question was raised and decided in case of *Chaska Co. vs. Carver Co.*, 6 Minn., 204, and though the plaintiff in that action is not a party in this, yet it and the defendants are the parties most to be affected by the decision of the question. The bond on which this action is brought is one of the bonds referred to in that case.

The Court then held that the plaintiff in that action could not recover *because the bonds were valid*, and we are asked in this case to hold that the plaintiff cannot recover because the bonds are *invalid*. This would be unjust. Even if we were satisfied that the doctrine of that case could not be sustained, we would not be justified in overruling it in this case. We, therefore, follow it without examination.

The order overruling the demurrer is affirmed.

***JAMES A. LOVEJOY et al vs. DORILUS MORRISON et al.**

L. and M. entered into a contract whereby M. was to furnish logs and L. to run certain mills for a specified time, for the purpose of manufacturing said logs into lumber for an agreed price. In an action by L. for a breach of the contract by M. in refusing to furnish logs or to pay for the work done, &c., the complaint set out at length a lease and supplement thereto under which L. held the mills under the St. A. W. P. Co., and the plaintiffs claimed as part of their damages the rate of rent agreed to be paid by the terms of the lease and supplement, from the time of the breach till the expiration of the contract to manufacture. *Held*—that the lease and supplement, together with other allegations of the

*Mr. Justice McMillan, being of counsel in this case, took no part in its hearing or determination.

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complaint by which the plaintiffs seek to charge the defendants with the particular rent specified in the lease and supplement as part of their damages, were irrelevant and redundant, and therefore properly stricken out.

This is an appeal from an order made by the District Court of Hennepin County striking out certain portions of the complaint on motion of defendants. A sufficient statement of the case appears in the opinion of the Court.

SMITH & GILMAN for Appellant.

H. R. BIGELOW and F. R. E. CORNELL for Respondent.

By the Court—BERRY, J.—This action is brought to recover damages arising from the breach of a contract, set out in full in the complaint, and entered into by and between the appellants as parties of the first part, and the respondents as parties of the second part. It appears that the appellants agreed to operate certain mills in St. Anthony for a specified time, for the purpose of manufacturing lumber for the respondents, and that the respondents agreed to furnish logs for the same and pay the prices specified in the contract for the work, which agreement it is alleged they failed to perform. The mills were leased to the appellants by the St. Anthony Falls Water Power Company, and the lease together with a supplement thereto, are set out at length in the complaint. A motion was made in the Court below to strike out the lease and supplement on the ground of redundancy, irrelevancy and repugnancy. And the same were ordered to be stricken out as irrelevant and redundant. We think the order was right. The counsel for the appellants contend that "the lease and supplement thereto were set forth in the complaint as allegations to show the tenure by which the plaintiffs held the mills, and more particularly the rents they were paying therefor." Then follows the allegation (ordered stricken out) "that by the breach of the contract the mills were left upon our hands unemployed and we subjected to said rents, which therefore constitute a part of the damages

sustained." Now, we apprehend that it was entirely immaterial on the question of damages what rents the appellants had agreed to pay or were paying for the mills. We do not understand the decision in 6 *Minn.*, 319, as the counsel appears to do. In that case, *p.* 354, the Court make use of the following language: "If, therefore, the contract is for manufacturing a given article, and mills and machinery are necessarily employed in making it, the reasonable or usual rent or value of the use of such mills or machinery enter into the cost of manufacture and should be taken into consideration in estimating the profits, because the profits are as directly affected by such expenses as by any other." And when in the conclusion of the opinion the Court say that "in estimating profits the rent of the mills should be taken into consideration as part of the cost of manufacturing the lumber," we think it is clear (taking the whole opinion together) that the word "rent" was intended to signify the value of the use of the leased premises, and not the particular rent which the appellants had agreed to pay.

The respondents had nothing to do with the lease and supplement. They were not parties to them and had no control over them whatever. Whether the appellants agreed to pay too much rent or too little, whether the conditions of the lease were favorable or unfavorable to the lessees, were matters of no concern to the respondents. They agreed to furnish logs for the mills and to pay certain prices for manufacturing the same into lumber, and did not agree to be responsible for the good or bad bargains of the appellants with third persons, whether those bargains were made for the purpose of carrying out the contract with the respondents or for other purposes. In our view of the matter, then, the lease and supplement were not material allegations in the complaint, but were irrelevant and redundant and therefore properly stricken out. *Pub. Stat.* 543, *sec.* 89; 542, *sec.* 80.

The other allegations ordered stricken out were as follows: "and had the defendants complied with the same," that is, with the terms of the contract, "on their part, the said parties of the first part to said contract would have been enabled to pay from

the earnings of said mills the rents therefor to the said Water Power Company, pursuant to the terms of said lease and supplement, but that by reason of the said breach of said contract said mills were left upon the hands of the said parties of the first part to said contract, idle and unemployed, and said parties of the first part to said contract with the defendants subjected to liability to said Water Power Company for said rents upon said lease and supplement, and thereby damaged in this respect to the amount of said rents so to be paid from and after September 2d, 1857, to-wit, in the sum of sixty-nine thousand three hundred dollars." Now, if the lease and supplement were, as we have already determined, irrelevant, because so far as rent was to be taken into account in estimating profits and damages, it was the value of the use of the mills which was material, and the particular price which the appellants had agreed to pay to the St. Anthony Water Power Company was entirely immaterial as a price, then it follows as a matter of course that the allegations just quoted were equally irrelevant, and must fall with the lease and supplement. Perhaps it is well to say here that we discover no claim in the complaint that the appellants kept the mills in readiness to fulfill the contract on their part after the alleged breach by the respondents. Under the decision in 6 *Minn.*, already cited, this might make an important difference in the cause of action and amount and nature of damages. In confirmation of the views which we have expressed we refer to a few authorities. *Masterton & Smith vs. Mayor &c., of Brooklyn*, reported in 7 *Hill*, 62, seems to be regarded as a leading case upon the subject of damages for the breach of executory contracts. Opinions were given by each of the three judges composing the Supreme Court at that time, (Justices Nelson, Bronson and Beardsley), and so far as the doctrines to which we shall refer are concerned, all of them concurred. The case has been followed in New York, and so far as we discover has escaped criticism. 2 *Selden*, 85. Sedgwick refers to it approvingly in his work on Damages, pp. 73, 238, 364. It is also approved by Judge Curtis in *P. W. & B. R. R. Co. vs. Howard*, 13 *How.*, (U. S.) 307, 344; in *Fox vs. Harding*, 7

Cush., 523; and in 3 *Parsons on Contracts*, 5th Ed., 184. The facts of the case were "that the plaintiffs contracted to procure, manufacture and deliver at their own cost and expense all the marble necessary for a certain public building then about to be erected by the defendants, the same to be of the best quality from the quarry of Kain & Morgan, in consideration whereof the defendants agreed to pay the plaintiffs a specified sum of money in installments. The plaintiffs immediately entered into a contract with Kain & Morgan by which the latter, in consideration of a stipulated compensation to be paid by the former out of moneys expected from the defendants, agreed to furnish the marble. The plaintiffs delivered and received pay for about one-sixth of the marble, according to the contract, and the defendants then suspended operations upon the building, refusing further to perform on their part," and thereupon the plaintiffs brought their action for the breach of the agreement and damages. It is well to observe here that in the case before us the lease was entered into six months before the contract between the parties to this action was executed, although the supplement was subsequent, while in the case cited, the contract with Kain and Morgan was entered into after the consummation of the agreement with the authorities of Brooklyn, and for the very purpose of carrying that agreement out. On the trial at the circuit the contract with Kain and Morgan was read in evidence by the plaintiff subject to the right of defendants to object to its admissibility during the progress of the cause. "When the plaintiffs rested the defendants moved that all the testimony in relation to the contract of Kain and Morgan with the plaintiffs, and the contract itself be excluded from the consideration of the jury as irrelevant;" but the motion was overruled and exceptions taken. The circuit Judge among other things, charged the jury that "the plaintiffs' contract with Kain and Morgan if made in good faith was entered into as a reasonable part of the performance by the plaintiffs of their own contract, and if the defendants by stopping the work, obliged the plaintiffs to break their contract with Kain and Morgan, then the damages on the latter

ought to be allowed to the plaintiffs, who would be responsible to Kain and Morgan for the same." This was excepted to by the defendants.

The Chief Justice in giving his opinion on appeal says: "It will be seen that we have laid altogether out of view the sub-contract of Kain and Morgan, and all others that may have been entered into by the plaintiffs as preparatory and subsidiary to the fulfillment of the principal one with the defendants. Indeed I am unable to comprehend how these can be taken into the account or become the subject of consideration at all in settling the amount of damages to be recovered for a breach of the principal contract. The defendants had no control over or participation in the making of the sub-contracts, and are certainly not to be compelled to assume them if improvidently entered into. * * * * In any aspect, therefore, these sub-contracts present a most unfit as well as unsatisfactory basis upon which to estimate the real damages and loss occasioned by the default of the defendants." A new trial was granted. Aside from the weight of this decision as authority we think the reasoning of the Court commends itself to sound common sense. The order appealed from striking out certain portions of the complaint is affirmed and the case remanded.

WILLIAM HOPE vs. PHILO STONE and wife, H. S. ALLEN et al.

S. executed a quit-claim deed running to A. of certain land on the Half Breed Reservation. At the time of executing such deed the title of the land was in the United States, subject to a usufruct by the half breeds of the Sioux nation. The deed contained a covenant by which S. bound himself, when he should acquire title from the United States, to make such further or other conveyance of the premises to A., his heirs or assigns, as should be valid and effectual to convey the premises, &c. Subsequently, S. acquired title from C., who acquired it from the United States. Afterwards by a full covenant warranty deed, S.

conveyed to H. all his "right, title, interest, estate, property, possession, claim or demand whatever to said premises." *Held*—that the quit-claim deed and covenant were not illegal ; that when S. acquired the title he held it in trust for the performance of his covenant, and that H. took it subject to the same trust.

This action was brought to determine the title to certain lands in Wabashaw county, being a portion of the Half Breed Reservation. The action was tried at the December Term, 1863, of the District Court in said county by the Court without a jury. The material facts as they appear in the case and as found upon such trial, are substantially as follows: Prior to the 20th of August, 1853, one Jenny Cratt, who was a half breed or mixed blood of the Sioux nation, and a beneficiary under the treaties and acts of Congress, by which the said Reservation was set apart and disposed of, with her husband, Oliver Cratt, were in possession of the premises described in the complaint, claiming the same as their property. Prior to said 20th of August, Cratt and wife conveyed the premises by quit-claim deed, containing covenants of further assurance to the defendant, Philo Stone, and also executed a bond agreeing and covenanting at a then future day to convey said premises to said Stone, and Stone entered into possession of the premises. On the 20th of August, 1853, Stone and wife conveyed the premises to the defendant, H. S. Allen, by a quit-claim deed, which was duly recorded on the 1st day of January, 1854, and Allen took possession. On the 6th day of March, 1855, said Stone and wife executed another quit-claim deed to said Allen, conveying the same premises, which was duly recorded the same day. The last mentioned deed was executed to cure a supposed defect in the description of the premises mentioned in the former deed. The two deeds are substantially alike, containing the same covenants, except that the second contains a covenant of non-claim which is not in the first. The other covenants are as follows, viz: "And the said parties of the first part, have covenanted and agreed to and with the said party of the second part, that whenever they or either of them, or their or either of their heirs or assigns, shall hereafter acquire from the United States, the title to any land which shall include the above described premises, he or they shall

and will stand seized and possessed of such title of the above described premises, to and for the use of said party of the second part, his heirs and assigns, and not otherwise, and that when all, any or either of the said parties of the first part, shall have thus acquired the said title, he or they shall on demand make such further or other conveyance of the said premises to the said party of the second part, his heirs or assigns, as shall be valid and effectual to convey the said premises to him or them, and to extinguish such use or trust." There is a slight difference in the phraseology of the deeds in respect to the covenant of further assurance, which is commented upon in the opinion of the Court. The titles, claims, liens and interests of the defendants respectively, other than Allen and Stone, are specifically found and set out by the Court below, and were acquired either directly from Allen, or through intermediate conveyances, &c., subsequent to the delivery and recording of the deeds from Stone and wife to Allen, and prior to the 1st day of March, 1862. In April, 1857, Jenny Cratt acquired the title in fee to the land in question from the United States, and on the 11th day of July, 1857, she and her husband conveyed the same to Stone by a warranty deed, which was duly recorded on the 13th July, 1857. On the 1st day of March, 1862, the defendant Stone and his wife, by a "full covenant warranty deed," conveyed to Hope, the plaintiff, *"all their and each of their right, title, interest, property, possession, claim or demand whatsoever to said premises,"* and said deed was duly recorded the same day. The plaintiff claims title to the premises under said last mentioned deed. The plaintiff had no actual notice of the existence of the two quitclaim deeds from Stone and wife to Allen, or of the claims or interests of the defendants, or any or either of them, until the service of the answer in the action. The plaintiff has never been in the actual possession of the premises, and neither of the parties to the action had such possession at the time of the execution and delivery of the deed from Stone and wife to the plaintiff; but one Robinson was in the actual possession, under the following circumstances: The Chippeway Falls Lumbering Company (one of the

defendants,) had rented the premises to one Eddy, who without the consent of his landlord gave the key to the building thereon to said Stone, and Stone without the assent of the adverse claimants rented the premises to said Robinson, who took possession of the same under an agreement that the rent should be paid to the party in whom the Court should adjudge the title to be vested, at the time of the execution and delivery of the deed from Stone and wife to the plaintiff, and still remains in such possession.

The conclusions of law as found and decided by the Court below are substantially as follows: The recording of the two quitclaim deeds from Stone to Allen, would not be constructive notice to the plaintiff, the grantor having no title to the premises when the same were executed. The possession of Robinson would not be constructive notice to plaintiff of any rights or interests of Allen or his assigns in the premises; such possession being that of a tenant, was not notice of the title of his lessor. The covenant of Stone to stand seized of the premises to the use of Allen and his heirs, &c., would not be effectual, except upon the contingency that Stone should acquire the title from the United States and not otherwise. Allen never had any interest in the premises, to which a judgment lien would attach. The plaintiff is a bona fide purchaser of said premises, without either actual or constructive notice of any rights or interests claimed by any of the defendants, and the title in fee simple is vested in the plaintiff; and the defendants, or either of them, have no valid claim or interest in said premises as against the plaintiff's title, and the respective interests claimed by defendants are adverse to the title of the plaintiff, and a cloud upon the same and should be removed.

Judgment was entered in favor of the plaintiff, pursuant to such finding and decision; the defendants appeal to this Court.

S. L. CAMPBELL and WILDER & WILLISTON for Appellants.

I.—The plaintiff not being in possession of the premises in question, this action cannot be maintained, and should have been

dismissed by the Court below. The complaint does not pretend to set forth the nature or character of the defendants' claim to the property, but simply avers the plaintiff's title and possession, and that defendants claim some interest adverse to the plaintiff. The defendants deny that possession, and the Court finds that the plaintiff is not and never has been in possession of the property. We claim this to be an action under the statute. *Comp. Stat.*, p. 595, sec. 1; 2 *Minn. R.*, 153; 5 *Id.*, 223; 6 *Id.*, 179; 7 *Id.*, 167; 8 *Id.*, 403.

[NOTE.—After the cause was submitted, the foregoing point was waived in writing by counsel for appellant.—REPORTER.]

II.—The Court erred in holding the plaintiff to be a bona fide purchaser without notice.

III.—The Court erred in holding the records of the deeds from Stone and wife to Allen, and of the deed from Allen and others to the Chippewa Falls Lumbering Company, and of the mortgage from the latter to McKittrick & Branch, and the judgments, &c., against the Chippewa Falls Lumbering Company, were not notice to the plaintiff. These deeds were not outside of but within the chain of title. Stone, the grantor, was also the grantor of the plaintiff. *Parkist vs. Alexander et al.*, 1 *John. Ch. R.*, p. 394; *Comp. Stat.* p. 405-6.

IV.—The Court erred in holding the possession of Robinson was not notice to the plaintiff, or at least that it was insufficient to put the plaintiff upon inquiry.

V.—The Court erred in holding the covenants to stand seized, &c., contained in the deeds from Stone and wife to Allen, were inoperative, and insufficient to make Stone, when he obtained the title, the trustee of Allen and of his grantees. It is immaterial whether Stone derived title mediately or immediately from the United States.

VI.—There was nothing in the deeds or in the arrangement between the parties against the policy of the law or against public policy. They did not convey or assume to convey the land, but only the possession, in connection with the covenants to stand

seized, &c., and for farther assurance of title if the same should be obtained.

W. W. PHELPS and WARREN BRISTOL for Respondent.

I.—*a.* This is an equitable action and can be maintained under the well established rules of equity jurisprudence. *Story Eq. Juris.*, 2 Vol., sec. 700, *et seq.*; *Hamilton vs. Butler*, 7 Minn., 167; 8 Minn., 403.

b. The pleadings show this to be an equity action.

c. Ejectment could not establish the rights of the parties, because the possession of Robinson, who held as tenant of respondent's grantor, is not adverse or against respondent.

II.—*a.* This action is within the statute. Respondent is the owner of the land in dispute in fee simple absolute, deriving title in a direct line from the government of the United States, which in the absence of an adverse possession confers the legal possession upon him. *Revised Stat.*, p. 595, sec. 1; *Id.*, 378, sec. 8; 4 *Kent*, 483-4; 5 *Pick.*, 135; 11 *Id.*, 1.

b. Robinson by operation of law became Hope's tenant. *Smith's Leading Cases*, 315; 3 *Pick.*, 154.

c. Possession of tenant, possession of the landlord; and he may, though not himself in actual possession, commence this action. 2 *Bouvier*, 352; *Rev. Stat.*, 595.

III.—*a.* In this State the record of a deed is not made notice, constructive or otherwise, of its contents.

b. The effect of a record under our statute is simply to perfect the grant. A subsequent recorded deed has precedence and priority to a prior unrecorded deed; and such subsequent deed to a grantee without notice passes the title. This being the effect of registration, the statute is properly silent as to notice. The record simply shows in whom the title of estates vests.

c. The records of the deeds and mortgage, and the docketing of the judgments in this case prior to the entry of the land, are not notice of themselves to those within the chain of title after such entry.

d. In investigating this title Hope was not required to go behind the primary grant of the land by the United States.

e. The registration of an unauthorized or illegal instrument, or one that is a nullity, is neither effective for any purpose, or notice. *Story Eq. Jur.*, 404; 8 *Paige*, 361; 3 *Ch. Dig.*, 132; 6 *Minn.*, *Baze vs. Arper*, 220; 6 *Minn.*, *Thompson vs. Morgan*, 292; 2 *Watts*, 75.

IV.—a. The deeds under which the appellants claim, create at most only an equitable interest in them, and Hope, taking his deed without notice of such equity, holds the land discharged of it. 8 *Paige*, 361.

b. Such a deed is not notice to subsequent purchasers. 3 *Ch. Dig.*, sec. 17, p. 132.

V.—The land being Indian lands at the time of the pretended conveyance of Stone to Allen, the same was not conveyed thereby. The deed was a nullity. 8 *Wheat.*, 673; 6 *Oranch*, 87; 13 *Pet.*, 195; 6 *Id.*, 557.

VI.—a. The deeds from Stone to Allen were illegal and void as against public policy and the laws. *U. S. Stat. at Large*, Vol. 4, p. 730; 6 *Peters*, 557.

b. A contract may be illegal without contravening any specific statute, provided it is opposed to the general policy and intent thereof. *Chit. on Con.*, sec. 602; 3 *Cush.*, 419; 14 *How. (U. S.) Rep.*, 449.

VII.—a. If the deeds were void, the covenant to stand seized is void also, as tainted with the same illegality. What may not be done directly may not be done indirectly.

b. A covenant to stand seized in no way affects Hope. At best it created but an equity, of which he had no notice, and of and from which he is discharged.

c. If such covenant amounts to anything it is a personal covenant from Stone to Allen, which Allen did not and could not assign by deed conveying land, as it did not run with the land, for the deed did not operate upon or effect land.

By the Court—BERRY, J.—The land in controversy in this

action is a part of what is commonly known as the Half Breed Reservation lying on the right bank of the Mississippi River and in the vicinity of Lake Pepin. Jenny Cratt was a half breed or mixed blood of the Sioux nation, and a beneficiary under the treaties and acts of Congress by which the Reservation was set apart and disposed of. All the parties to this suit except Madeline Stone are white persons. During a period of time prior to August 20, 1853, Jenny Cratt and her husband Oliver Cratt, had been in the sole and exclusive possession of the premises in litigation, claiming the same as their property, and prior to said 20th day of August, they quit-claimed the same to Philo Stone, with covenants for further assurance, and also executed a bond running to said Stone, in which they covenanted to convey the said premises to him at a future day. Thereupon Cratt and his wife surrendered the sole and exclusive possession of the premises to Stone, by whom it was retained until the 20th day of August, 1853, when he and his wife quit-claimed the property to H. S. Allen, with covenants to stand seized, and for further assurance. On the 6th day of March, 1855, some doubts being entertained as to the sufficiency of the description of the land in the first deed from Stone to Allen, Stone and his wife executed another quit-claim deed in favor of Allen, which contained covenants of non-claim for further assurance and to stand seized. The premises described in each of the deeds from Stone to Allen are found by the Court below to be the same premises to which this action relates. The other defendants all claim under Allen, either directly or through intermediate conveyances, by a variety of titles and liens, all subsequent in their inception to the delivery and registration of the deeds from Stone to Allen, and prior to the deed from Stone to Hope. In April, 1857, Jenny Cratt entered a tract of land, comprising the land which is the subject of this action, at the Red Wing Land Office, in conformity to the laws and treaties relating to said Reservation. This is the beginning of the title in fee from the United States. On the 11th day of July, 1857, she and her husband by a warranty deed conveyed to Philo Stone "*all their and each of their right, title, interest, property, possession, claim and demand*

whatever, of in and to" the premises in controversy, and the deed was duly recorded. On the 1st of March, 1862, Stone and his wife by a "full covenant warranty deed," (as is found below), conveyed to William Hope, the plaintiff and respondent, "*all their and each of their right, title, interest, estate, property, possession, claim or demand whatsoever to said premises,*" and this deed was also duly recorded. Here it is proper, though perhaps not very important, to say that a preliminary question was raised as to whether the plaintiff had shown himself to be in possession, and so entitled to maintain this action to determine an adverse claim under the statute, but whatever there is in the point is waived in writing and taken out of the case. Such a practice seems to be sometimes allowed. *Whitten vs. Whitten*, 3 *Cush.*, 195.

To return, there can be no question but that the deed from Cratt and wife, bearing date July 11, 1857, passed the legal estate in fee simple absolute to Stone. And the inquiry upon the answer to which this case may properly turn, is whether Stone then held the title subject to any valid legal or equitable rights on the part of Allen, or of his representatives in interest, under the quit-claim deeds executed by Stone to Allen in 1853 and 1855, or the covenants therein contained. It will be recollected that Stone executed two quit-claim deeds in favor of Allen, the latter of which was intended to correct an apprehended insufficiency of the description of the land in the first deed. In our view it is unnecessary to inquire whether the first description was sufficient or not. If it was, then the second deed was superfluous for the purpose for which it was intended, and if it was not then the defect was cured by the second deed. No rights accrued to third persons intervening the deliveries of the two instruments. Aside from the description the principal difference which we observe is that the second deed contains a covenant of non-claim which is not found in the first. But so far as this covenant is concerned, the weight of authority would seem to be that in a case like this it would only relate to the estate, right or interest actually conveyed by the quit-claim deed, and would not preclude the covenantor from setting up in his own favor, and against the covenantee, any after

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acquired estate or interest. See 2 *Washburn Real Prop.*, 465, 496-7, 665, and cases cited; *Miller vs. Ewing*, 6 *Cush.*, 34. The other covenants are as follows: "And the said parties of the first part have covenanted and agreed, and do hereby covenant and agree, to and with the said party of the second part, that whenever they or either of them, or either of their heirs or assigns, shall hereafter acquire from the United States the title to any land which shall include the above described premises, he or they shall and will stand seized and possessed of such title of the above described premises to and for the use of said party of the second part, his heirs and assigns, and not otherwise, and that when all, any or either of the said parties of the first part shall have thus acquired the said title, he or they shall, on demand, make such further or other conveyance of the said premises to the said party of the second part, his heirs or assigns, as shall be valid and effectual to convey the said premises to him or them, and to extinguish such use and trust." The covenant to stand seized, it would seem, can only be supported as such when based upon a consideration of blood or marriage, neither of which appears in this case. 4 *Kent Com.*, 493. It is a principle of law "that if the form of the conveyance be an inadequate mode of giving effect to the intention according to the letter of the instrument, it is to be construed under the assumption of another character so as to give it effect." *Ibid.* And so, a covenant to stand seized is sometimes held good as a grant. But the invoking of that principle would not help this case, for at the time he entered into the covenant to stand seized, Stone had nothing to grant, and clearly, in the absence of a covenant of warranty, nothing would pass by his grant. But we can conceive of no reason why the covenant for further assurance was not binding upon Stone, his heirs and assigns, according to its purport. There is, to be sure, a difference between the language of the first and second deeds as to the contingency upon which the obligation to make further assurance was to become operative. In the first, Stone agrees to make further assurance when he, his heirs, &c., "shall hereafter acquire from the United States or otherwise, the fee simple, title," &c. In the second deed

the words "*or otherwise*" are omitted. We think the difference is verbal and not substantial, and that it was immaterial whether Stone acquired title mediately or immediately from the United States. If the words "*or otherwise*," were as we think superfluous, then their omission from the second deed would have no effect. And any inference which might be drawn from the fact of this omission that the covenantors intended to vary their liability as expressed in the first deed, is repelled by the stipulation of the parties upon which the Court find that the second deed was "executed and delivered on account of doubts having arisen in respect to the *sufficiency of the description*" in the first deed.

This view would appear to be strengthened by the fact as found below, that Stone originally acquired his possession and claim of right under a quit-claim deed from Cratt and his wife, which contained a *covenant for further assurance*, and under a bond for a conveyance *at a future day* executed by the same parties. Taken in connection with other facts of the case, we think this has a tendency to show that the understanding and expectation was that Stone would acquire title from the United States *indirectly*, as he did.

Whether Stone derived his title from the United States directly or through mesne conveyance, we think he held it in trust for Allen, or his representative in interest. For it is obvious on general principles, and well settled by authority, that where a covenant for further assurance exists, the covenantee has the right to invoke the aid of a court of equity to compel a specific performance of the covenant. 2 *Sug. Vend.*, 541; 2 *Wash. R. P.*, 667; *Rawle on Cov.*, (2d Ed.,) 208; *Colby vs. Osgood*, 20 *Barb. (S. C.) R.*; 339. See also *Fitch vs. Fitch*, 8 *Pick.*, 482. A vendor who has received the purchase money but has not conveyed, is a trustee of an implied trust. 2 *St. Eq. Jur.*, 789. A covenant for further assurance would place the covenantor in a similar relation to the covenantee. And in the particular case before us the covenant would seem to be in substance the same as a contract of sale. For upon the face of the instrument in which the covenant is found, it appears that at the time of its execution the covenantor, Stone,

had no title to the premises, and by his covenant he agrees to make title when acquired to the covenantee. Under the deed of March 1st, 1862, Hope acquired the *right, title and interest* of Stone, and nothing more, for that is all which is attempted to be transferred by the terms of the conveyance. This right, title and interest, as we have endeavored to show, was the fee, subject to the trust, created in favor of Allen by the quit-claim deed and the covenants therein, and Hope took the title subject to the same trusts. 20 *Pick. R.*, 458; 12 *Met.*, 177; 14 *N. H.*, 226; 3 *Wheat.*, 452; *Adams vs. Cuddy*, 13 *Pick.*, 463; 12 *Pick.*, 66; 4 *Pick.*, 464; 13 *Pick.*, 116, 119, 120; 5 *Gray*, 528; 2 *Story Eq. Jur.*, 784; *Rawle on Cov.*, 420-2 and notes. And in this view of the matter it is entirely unimportant what was the effect of the registration of the quit-claim deeds from Stone to Allen prior to the acquisition of any title from the United States, and it is equally immaterial what was the effect of the possession of Robinson. For the only light in which either the possession or registration could be contended to be important would be as notice of the rights of Allen or his representatives in interest. And if the deed from Stone to Hope had been a conveyance of the land, instead of Stone's right, title and interest, then it might be necessary to inquire whether the registration or possession were notice to Hope of rights in third parties antecedent and adverse to his own. But as he took by the deed from Stone only Stone's right, he of course took nothing legal or equitable which Stone had previously transferred to Allen. *See authorities above cited.* So that the question of notice is out of the case, or as might be said, the terms of the deed itself were notice to him of the existence of any and all rights which had previously been conferred by Stone upon any and every other person. But it is objected that the deed from Stone to Allen was illegal and void as against public policy and the law. It is not claimed that there is any statute specifically prohibiting such transactions, or by which they are expressly declared to be void. There would appear to be no illegality in an agreement to convey lands when title should be acquired, although at the time of executing such agreement the title

is in the United States. *See Fackler vs. Ford*, 24 How. U. S. R., 323; 1 *Mor. (Iowa) R.*, 367, 275. But the statute to which our attention is called in support of the objection of illegality, is "an act to regulate trade and intercourse with the Indian tribes," &c., passed in 1834, and found in 4 U. S. St. at Large, 730. Even if that act be applicable to the Reservation, which is by no means clear, we are unable to perceive how the deed from Stone to Allen can be regarded as contravening it in letter or in spirit. By section 11 of the act a penalty is imposed upon any person making a settlement or survey, or designating any of the boundaries by marking trees, &c., on any lands belonging, secured or granted by treaty with the United States to any Indian tribe, but there is nothing in this case to show that Stone, Allen, or any of Allen's successors in interest, had done anything to subject themselves to such penalty. Section 12 provides that no purchase, grant, lease or other conveyance of lands, or of any title or claim thereto from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless it be made by treaty or convention entered into pursuant to the constitution; and a penalty is imposed upon any person who shall without authority attempt to negotiate such treaty or convention, or to treat with any nation or tribe of Indians for the title or purchase of land by them held or claimed. Even if this provision be applicable to the half breeds and the Reservation, we can see nothing in the deed from Stone to Allen violative of the law. The facts here present a case of quit-claim deeds which probably conveyed nothing because the grantor had nothing to convey, the title being in the United States subject to a usufruct by the half breeds. Certainly there was nothing illegal or against public policy in the execution of these deeds. But further, the deeds contained a covenant by the releasor to make such further or other conveyance as shall be valid and effectual to convey the premises when he shall have acquired title from the United States. There could be nothing wrong in this. We think the covenant was valid and binding in Stone; that when Stone acquired the title he held the land in trust for the performance of

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his covenant, and for the reason before given that Hope took it subject to the same trust.

The judgment below is reversed, and the action remanded for further proceedings.

[Wilson, Ch. J., dissented, but filed no opinion.]

LEWIS H. KELLY vs. GEORGE W. BAKER, et al.

Without reference to the amendment of 1860, our statute exempts as a homestead a quantity of land not exceeding one lot in any incorporated city, and no restriction is placed upon the uses of any part of it, provided it is the dwelling place of the claimant.

The facts in this case as they appear from the admissions in the pleadings and the stipulation of the parties, are substantially as follows: The plaintiff was owner of a certain lot of land in the city of Rochester, on which prior to January 1, 1861, he had erected a brick building, two stories high, with basement. The front part of the building was built and rented and used for a store, and was adapted to such use; the second story of the front part was used as a printing and job office by a company of which plaintiff was a member, and by the plaintiff (who is a physician,) for his office; the basement under the front of the building was also rented, a part of it in connection with the store and the other part usually for pork packing; in this part at the time of the levy hereinafter mentioned the plaintiff had some articles stored. The rear part of the building was fitted up for and used by the plaintiff as his dwelling house, having one entrance through a hall in the rear of store, and connected with it by a door, and one from the rear of the building; the building is situated on a corner with an alley in the rear. The defendant Baker was Sheriff of Olmsted

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County, at the time of the levy and sale hereinafter mentioned. A portion of the other defendants are judgment creditors of the plaintiff, and sued out executions upon their respective judgments, under and by virtue of which the said Sheriff duly levied upon and sold to Charles C. Willson, also a defendant, the land upon which the said front part of said building was situated with the appurtenances. The judgments upon which said executions were issued were docketed in Olmsted county, one May 14, 1861, the other March 8, 1861, and the executions were issued May 14th, 1861. After the levy the plaintiff duly notified the said Sheriff in writing that he claimed the whole of said lot as his homestead. This action was brought to cancel the certificate issued on said sale, declare the sale void, and enjoin the said Sheriff from executing a deed thereunder.

The cause was tried at the District Court in Olmsted county, upon the pleadings and stipulations of the parties without a jury. The Court found in favor of the plaintiff, and a judgment was entered adjudging the said levy and sale void; that the said certificate be cancelled, and the said Sheriff be enjoined from executing a deed of the premises under said sale, &c. The defendants appealed from this judgment to this Court.

CHARLES C. WILLSON for Appellants.

J. A. LEONARD for Respondent.

By the Court—BERRY, J.—Our statutes relating to homestead exemption are so indefinite, loose and obscure that it is difficult to put any construction upon them which is not open to criticism and objection. Under the last clause of *Sec. 12, in Art. 1 of the Constitution*, it is made the duty of the Legislature to provide by law for the exemption of a reasonable amount of property from seizure or sale for the payment of any debt or liability, and in this case no question is made as to the constitutionality of the law. Certainly there is nothing in the constitutional provision referred to which required the Legislature to impose any particular condition

or mode of occupancy, actual possession or personal use upon the right to hold property, real or personal, exempt from forced sale on process of law. There is nothing which forbids the exemption of real property, save upon the condition that it be wholly and exclusively occupied by the debtor as a place of abode for himself and family; and the amendatory act of 1860, by which the owner of a homestead is permitted to remove from the same, or sell and convey it without forfeiting his privilege of exemption, shows conclusively that this view has been adopted as well as acted upon by the Legislature itself. Homestead in its ordinary signification conveys the idea of the place of residence or dwelling of its owner, and in that sense it seems to have been used in the act of 1858 now in force. *Folsom vs. Carli*, 5 Minn., 333; *Tillotson vs. Millard*, 7 Id., 318. But it includes not only the ground upon which the dwelling house rests but more; and how much more it may include in this State for the purposes of exemption, the statute defines. And where as in the case at bar the property lies within the limits of an incorporated city, it is provided that a homestead *consisting* of a quantity of land not exceeding in amount one lot, &c., shall not be subject to levy, &c.; and the owner has the right of selection, so that provided he confines himself to a compact quantity not exceeding *in amount* one lot, he can exercise an option as to the shape of the land which he desires to claim as his homestead. Even if there should be any doubt as to his right to make this selection under *Section 92, p. 569, Pub. Statutes*, it is clearly recognized in *Sections 94 and 95* of the same chapter. It is unnecessary for us to determine what constitutes a lot within the meaning of the statute, as no point is made on that question in this case. We think he has a right to select the full quantity of land for the exemption of which the law provides. For in the first place one of the elements of which a homestead is made to *consist* by statute, is a quantity of land not exceeding 80 acres, or one lot as the case may be, to be selected by the debtor. In the second place by *Sec. 94*, the householder is authorized to notify the officer making a levy "*of what he regards as his homestead, with a description thereof within the limits above described, and the*

remainder alone shall be subject to sale under such levy." In the third place by *Sec. 95* it is further provided, that if the plaintiff in execution is dissatisfied with the quantity selected by the owner, the levying officer must set off the *amount specified* in *Sec. 92*. In the fourth place by *Sec. 96*, after setting off said amount the officer is required to sell only the property *not included in the set off*, and to *except the quantity set off* from his deed of conveyance. And finally it is to be observed that no limitations were imposed by the Legislature upon the use which should be made of the homestead of 80 acres, or of one lot provided only it was the dwelling place of the party claiming the exemption. As to the balance, beyond what was required for the site of his house, the claimant seems to have been left free to allow it to remain unenclosed, unimproved, vacant and idle, or to devote it to any use which he might choose. A different view of the question presented here has been taken in *Casselman vs. Packard*, 16 Wis., 115; but if the statute of Wisconsin be like ours, the reasoning of the Court in that case is not satisfactory to us. The amendatory act of 1860, by which a claimant was authorized to remove from or sell his homestead, was referred to on the argument of this cause, but we perceive no necessity for construing it at this time. In our view of the law the respondent was entitled to claim the whole tract described in his notice, including the part levied on, and as no objection is made to the form of his notice to the officer, we think the sale was unauthorized.

With the justice or policy of the exemption law we have nothing to do, and if it should be thought that the statute under our construction is calculated to do injustice, there is another department of the State government which can apply a remedy.

The judgment of the District Court is affirmed.

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A. R. CAPEHART VS. BENJAMIN VAN CAMPEN.

Where a judgment of the District Court is reversed in the Supreme Court and the case remanded, and no final disposition has been made of it, the action in which such judgment was recovered is *pending*, and a complaint in a suit brought upon the same cause of action upon which the judgment was founded, and between the same parties in interest, and alleging these facts, is demurrable.

This action was brought in the Ramsey County District Court. The plaintiff in his complaint alleges the execution of a promissory note by the defendant to one Joseph Daniels; its assignment and delivery by said Daniels to one William E. Brimhall, who commenced an action thereon in the Ramsey County District Court; that pending said action said Brimhall sold and transferred his interest in the cause of action to one E. A. Weller, and endorsed and delivered said promissory note to him; that said Weller sold and transferred his interest in said cause of action to said plaintiff, and endorsed and delivered said promissory note to him; that he was then the lawful owner and holder thereof; that judgment in said action was recovered against said Van Campen; that said action was carried by appeal to this Court, and that it was considered and adjudged by this Court that the said judgment be reversed, and the said action remanded to the District Court; that judgment for costs was entered in this Court against said Brimhall; that no part of said judgment nor of the said promissory note had been paid, except to the extent of a set off allowed by said District Court. A demurrer was interposed to the complaint, specifying among other things as a cause of demurrer, "that said complaint shows upon its face that there is another action pending between the same parties in interest for the same cause, in that—

"1. The transfer of the cause of action in the action of Brimhall

Capehart v. Van Campen.

vs. Van Campen, subsequent to the commencement of said action, made said transferee the real party in interest in said action, though Brimhall continued the nominal plaintiff, and the matter so far as Van Campen is concerned, stands precisely as if said transferee had been substituted plaintiff.

"2. The complaint shows said suit of Brimhall *vs. Van Campen* is still pending in said Supreme Court, no final judgment having been rendered on said decision of said Court, and no further proceedings having been taken thereon."

The demurrer was sustained by the District Court. An appeal from the order sustaining the same is taken to this Court.

A. R. CAPEHART, Appellant.

I.—The determination of the Court in the former action, was a final judgment upon the issues raised and facts found therein.

1. The error in the judgment by the Court below was one of law, in assuming that the Courts of this State take judicial notice of the laws of New York, without proving the same as a fact. *See this case*, 8 *Minn.*, 13.

2. The complaint shows that "it was considered" by the Supreme Court, that the former judgment be reversed; that such order was entered and a judgment rendered for disbursements, which should have been rendered in the first instance by the Court below. 3 *Minn.*, 207; 5 *Id.*, 442; 8 *Id.*, 96.

II.—That judgment is no bar to this action.

1. A judgment of reversal for the defendant gives him no affirmative relief. *Bac. Abr. Error*, M. 2; 2 *Tidd's Pr.*, 1179; 8 *Wend.*, 9.

2. A former judgment is no bar to a second action for the same cause, unless there was a trial upon the merits. 6 *Minn.*, 53.

GEORGE L. OTIS for Respondent.

I.—The appellant who claims the note in question by regular assignment from Brimhall who brought the former action thereon,

stands in Brimhall's shoes, and unless Brimhall himself could have maintained this action had he not transferred the claim, the appellant cannot. We think that this proposition will not be controverted.

II.—Neither Brimhall nor the appellant can maintain this action, because the complaint shows there is no cause of action.

1. The judgment below in the former suit is no cause of action, because that judgment was appealed from and reversed, and now stands reversed.

2. The note in question is no cause of action, because it is merged in the final judgment in the former action of Brimhall vs. Van Campen.

The sole ground upon which the appellant relies to maintain this action is this: In the former action the plaintiff failed to allege and prove one material fact necessary to a recovery, to-wit: What was the statute law of New York on the 1st day of August, 1858, as to contracts made on Sunday? The principle *nemo bis vexari pro eadem causa*, is applicable and perfectly conclusive of this case.

If any authorities are necessary to show that the judgment in the former action is a conclusive bar to this action, we cite the following among many others: *Ramsey & Valtier vs. Herndon*, 1 *McLean*, 450; *Smith vs. Whiting*, 11 *Mass.*, 259.

By the Court—BERRY, J.—The complaint in this case sets out a cause of action upon a promissory note, and also certain matters of anticipated defence which it seeks to avoid. To this complaint the respondent interposed a demurrer, from the order sustaining which an appeal is taken to this Court.

There is also an agreed "statement of case," in which some of the facts stated in the complaint are set out somewhat more in detail than in the pleadings, with perhaps allegations of new matter.

As the demurrer was taken to the complaint and not to the statement of case, we are unable to perceive on what ground the statement is entitled to any consideration, and so we lay it aside.

It is alleged in the complaint that a former action was brought

in the District Court for Ramsey County upon the same promissory note, by one Brimhall, the predecessor in interest of the appellant, against the respondent; that judgment was rendered in favor of Brimhall for a balance, after deducting a counter claim; that an appeal was taken from said judgment to this Court, where, upon "due proceedings had, it was considered and adjudged * * * that the said judgment be reversed and the said action remanded to the District Court." *Brimhall vs. Van Campen*, 8 *Minn.*, 13. It is not necessary for us to determine whether the former judgment was or was not an adjudication upon the merits of the same cause of action, between the same parties in interest now before us, nor whether that judgment would or would not have been a bar to this action if unreversed. The judgment was reversed by the proper tribunal, and the action remanded to the District Court whence it came, so that it no longer possessed the qualities of a final judgment upon which to found a plea in bar. Nor is it at all important whether or not the complaint shows that all the formal steps necessary to return the action to the District Court have been taken. If they have not been taken then the action is pending in the Supreme Court, and if they have been taken then it is pending in the District Court; and which ever horn of the dilemma is preferred, in either case it appears upon the face of the complaint that there is another action pending upon the same subject matter, between the same parties in interest now before us in this action. See *Sec. 37, page 535, Pub. St.*; *Sec. 34, page 629, Id.*

The order sustaining the demurrer is affirmed.

GOODRICH & TERRY, Plaintiffs, vs. HOPKINS & BUSY, Defendants,
and J. W. DRESSER, Garnishee.

Section 17, page 627, Pub. Stat., so far as it requires eight days notice of a motion, does not have reference to orders to show cause.

The granting of an order to show cause why a motion should not be allowed, implies leave to renew the motion if it has been previously made.

In removing the default of a garnishee and permitting him to disclose, it is necessary to fix a time and place for his disclosure.

A person summoned as garnishee is not entitled to payment in advance of his fees for travel and attendance.

This action was commenced in the Steele County District Court. The garnishee was summoned to appear before the Judge of said Court at Owatonna, December 5, 1864, which was the first day of a general term; no fees were paid the garnishee, nor was their payment waived. The garnishee failed to appear, and the Judge ordered judgment against the garnishee for the amount of plaintiffs' demand against the defendant. • On the 6th December, 1864, the garnishee appeared before the Court by his attorney, and moved the Court, upon affidavits excusing the default, &c., to set aside the same and allow him to disclose. The plaintiffs, by their attorney, opposing the motion, read counter affidavits. The motion was denied by the Court. On the 7th December, 1864, said garnishee obtained an order for the plaintiffs to show cause, before the Court on the 21st of said month, why said default should not be set aside, and said garnishee be allowed to disclose; which order required that the said order and the affidavits and papers upon which it was founded, should be served on plaintiffs' attorney at least six days before the day of hearing. The said order, &c., were served on the 7th day of December, 1864. At the hearing

substantially the same affidavits were used by both parties as upon the former motion. The Court ordered that the default be set aside, and the garnishee be allowed to disclose, but did not fix any time for such disclosure. The plaintiffs appeal from this order to this Court.

LA DUC & HALL for Appellants.

I.—The affidavits upon which the order to show cause is founded do not show any good special reason why a notice of motion of less than eight days should be given. See *Whittaker's Prac. Vol. 1, p. 366, 3d Ed.*; *Voorhies' Code, 602, Note F*; *Comp. Stat., 627, sec. 17*; *Laws 1862, p. 68.*

II.—This motion has been once heard and denied, and no leave has been given to renew it, and as all the material facts upon which the motion is founded are the same as upon which the former motion was founded, it cannot be heard again. See *Voorhies' Code, 599, Note L*; *Minn. R., Vol. 6, 558, case of Irwin vs. Meyers*; *3d Ed. Whittaker's Prac., Vol. 1, 379.*

III.—It is immaterial that it be claimed that this motion is founded upon a different statement of facts and containing new matter, for the new matter which will alone justify the renewal of a motion without leave, must be something which has happened, or for the first time come to the knowledge of the moving party since the decision of the former motion, and that fact should affirmatively appear upon the affidavits of the moving party. The applicant must disprove laches. 1 *Whittaker's Prac., 379*; 4th *Abbott, 402*; *Pattison vs. Bacon, 21 How., 478*; 12 *Abbott, 142*; *How. N. Y. Code, 620.*

IV.—It does not appear but that all the facts upon which this motion is founded were known to the garnishee at the time the former motion was made. Therefore this being a motion to set aside a judgment, it cannot be repeated. 2 *Whittaker's Prac., 578*; *Pattison vs. Bacon, 21 How., 478*; 12 *Abbott, 142.*

V.—To sustain a motion to set aside a default the moving party must make the usual affidavits of merits. 2 *Whittaker's Practice, 578.*

VI.—It is not necessary to advance or prepay the fees of a garnishee in order that he may be duly summoned. *Laws* 1860, 246; *Comp. Stat.*, 673, sec. 3; *Id.*, 660, sec. 4.

VII.—In case the Court removes the default of the garnishee, it should be only on condition that he appear and disclose within a given time.

VIII.—The Court will not set aside a judgment obtained against a garnishee who fails to make a return after a copy of the writ and notice to make the return have been served upon him. 3 *Kinnis' Law Compend.*, 88; *Case of Durrant vs. Stagers*, 2 *N. & M.*, 480.

COLE & CASE for Respondent.

The purely technical objections, interposed to the motion, may be summarily disposed of.

I.—The power of the Judge of the 1st District to grant the order to show cause, and that it was exercised in due form, does not admit of question. *Chap. 15, Laws* 1862; *Chap. 42, Laws* 1863; *Chap. 37, Laws* 1860; *Marty vs. Abel*, 5 *Minn.*, 27.

II.—The authorities which hold that the affidavits must show a good special reason why a notice of less than eight days is requisite to uphold an order to show cause, are based upon an express and stringent rule of the Court of Common Pleas and Supreme Court of New York, and have no application here. *Rule 39, N. Y. Sup. Ct.*; 1 *Whittaker's Pr.*, (3d Ed.,) 346-351.

III.—As, however, the principal office of the order was in this case, as usually under our practice, to designate the time and place for hearing the motion, and was accompanied by a notice, and was in fact served more than eight days before the hearing,—the objection based solely upon the fact that the order permitted six days' notice instead of eight, is, we submit, somewhat beneath the dignity of this Court.

IV.—It is objected that the motion had been once heard and denied, and no leave had been given to renew it.

The authorities upon which this objection rests are also based

upon an express rule of the New York courts. *Mills vs. Thursby*, 15 How., 114; 1 *Whittaker's Pr.*, 3d Ed., 379.

Our own rule is directly the reverse, and authorizes an application for an order to show cause, or a motion upon notice, to be renewed without leave. *Expressio unius est exclusio alterius*. Rule 15, page 14, 6 Minn.

But if the rule were otherwise it might be relaxed in the discretion of the Court, and this Court would refuse to review the exercise of that discretion upon appeal. Chap. 16, Laws 1862.

If consent were necessary, however, the granting the order to show cause, by the same judge who on the day before denied the motion, is an explicit consent to its renewal.

V.—But it is urged that leave can only be granted upon a new state of facts, which have come to the knowledge of the party since the decision of the previous motion. Admitting that our rule of Court were applicable to this case, the statement of the counsel is but a partial and one sided view of the law. While discovery of material facts may be one ground upon which leave is granted, another, equally common, is when the first motion is denied by reason of some defect in the moving papers, arising from ignorance of practice, &c., and which is corrected in the second application. *Dolphus vs. French*, 5 Hill, 494 and Note; Sec. 29, page 628, Comp. Stat.

This is precisely the case here. The first motion was denied because the affidavit stated merely that the garnishee did not owe the debtor sufficient to pay the judgment. It is obvious that the affidavit might have been true, and yet the garnishee might have been owing the defendant a sum only barely less than the judgment. It was what, in the language of pleading, is known as a *negative pregnant*. The affidavit upon the second application corrected this error by a new statement of facts, and made a full disclosure.

VI.—But it is said there should have been an affidavit of merits. It is difficult to perceive the meaning of this objection. A reference to the prescribed form for an affidavit of merits will show that it is entirely inapplicable to an application by a garnishee.

The affidavit actually presented disclosed the facts and all the facts, and is, we conceive, the best and only affidavit of merits applicable to the case.

VII.—But the application was addressed to the discretion of the Court and is not appealable. *Sec. 13, page 249, Laws 1860; Irwin vs. Myers, 6 Minn., 338.*

VIII.—The neglect to pay or tender the fees for his appearance to the garnishee, absolved him from all obligation to appear and disclose, and no legal judgment could be rendered against him by default. *Sec. 3, page 246, Laws 1860; Sec. 3, page 675, Comp. Stat.*

By the Court—BERRY, J.—With regard to the objection that the order to show cause improperly provided for notice of hearing of *not less than six days*, it is only necessary for us to say that *Sec. 17, page 627, Pub. Stat.*, so far as it requires eight days' notice of a motion, does not have reference to orders to show cause. That section authorizes the Judge to prescribe a *shorter time* by order to show cause, and in the absence of anything to the contrary, it is to be presumed that the order is made in a proper case and in the exercise of suitable discretion. *See Marty vs. Ahl, 5 Minn., 33.*

It appears that a motion had been made on the 6th day of December, to remove the default of the garnishee and permit him to disclose, which was denied; and it is insisted that the motion which was to be heard under the order to show cause was for the same purpose as the prior motion and based upon the same state of facts, and so could not properly be made without leave of renewal first obtained from the Court. This course of practice is laid down in *Irvine vs. Meyers & Co., 6 Minn., 558. Rule 15, (Dist. Ct. Rules,)* adopted subsequently to that decision, was referred to upon the argument on this point, but we think it has no application here. But even under the rule laid down in *Irvine vs. Meyers & Co.*, we have no hesitation in holding that the order to show cause was in itself sufficient leave to renew the motion for the removal of the default. The only object in requiring leave to

be given is that the Judge as well as the adverse party may not be harassed by repeated applications of the same nature for the same purpose and in the same action, unless for some satisfactory reason permission for a new hearing is granted. It is difficult to perceive why this object may not be attained as effectually by an order to show cause, as by formal and express leave. The granting of the order implies leave. The parties being then properly brought before the Judge on the 20th day of December, the next question which presents itself is whether the action of the Judge is reviewable. It is true as is claimed by the respondent that the application was addressed in some degree at any rate to judicial discretion, the exercise of which will not be questioned unless abuse appears. There was some conflict in the affidavits in regard to the facts under which the default occurred, and in the use of proper discretion in determining the weight of evidence, we think the Judge might be warranted in removing the default, and so far we perceive no abuse of discretion. But *Sec. 13, page 249, Laws 1860*, provides that simultaneously with the removal of the default, the Court is to permit the garnishee "to appear and answer on such terms as may be just."

It was insisted at the hearing below that if the default were removed, a time should be fixed for disclosure. This we think should have been done. If it be not done the statute makes no provision for bringing the garnishee before the Court again to make his disclosure. And although it is possible that an ingenious practitioner might discover some way to accomplish this object, inasmuch as the matter was pressed upon the attention of the Court below at the time of the hearing, it was but just in fixing the terms upon which the default was to be removed, that a day and place should be set for the garnishee to appear and disclose, and that the plaintiff should not be put to the trouble of making another and special application to the Court for that purpose, even if that would be allowable or effectual. We do not think the pre-payment of fees to a garnishee is essential to bind him to appear. The statute does not expressly require pre-payment, and by *Secs. 27 and 28, Laws 1860, page 247*, it seems that whether he is to be

allowed fees or not is contingent, and that if he is adjudged chargeable he is to deduct them from the amount with which he is charged, and to be held accountable for the balance only. These sections are clearly inconsistent with the requirement of pre-payment. Some other points were raised on the argument which we deem unimportant.

We direct the order of the Court below to be modified, by fixing therein a time and place for the garnishee to appear and dis-close, and remand this action for that purpose and for further proceedings thereupon.

GEORGE C. STARBUCK vs. JOHN A. DUNKLEE.

An appeal lies from an order striking out portions of an answer.

Where a contract for the performance of certain services at an agreed price is admitted to be in full force, an allegation in an answer that services performed by the defendant under the contract were of a specified value is immaterial and irrelevant.

When the answer admits the receiving of a large quantity of wood for transportation, the defendant is not permitted to deny any knowledge whether the quantity was as alleged in the complaint or otherwise unless he shows some excuse for his want of knowledge upon the subject.

A denial of all the allegations of a complaint *except what the Court may construe to be admitted* in the foregoing part of the answer, is bad.

The complaint in this action alleges the making of a contract on the 5th of December, 1863, between the plaintiff and defendant, by which the defendant, in consideration of \$625 theretofore paid to him by plaintiff, agreed to transport and convey 350 cords of wood then owned by plaintiff—about 150 cords from Chaska, and

200 cords from Carver, in the State of Minnesota, and to deliver the same to plaintiff at St. Paul, on or before the 1st July, 1864, without any other charge, cost or expense to the plaintiff for freight or wharfage. That the defendant in April, May and June, 1864, actually took into his possession 348 cords of said wood, the property of plaintiff, to be so carried and transported to St. Paul pursuant to said contract, but has only delivered $291\frac{1}{4}$ cords to the plaintiff, and has converted the balance— $57\frac{3}{4}$ cords, which was then and there worth \$5.50 per cord, to his own use, amounting to the sum of \$317.62. Demand of judgment for \$317.62, and interest from July 1, 1864.

The defendant in his answer admits the making of the contract as alleged, and states that said 5th day of December was Sunday. Defendant admits that in April, May and June, 1864, he took into his possession at Carver and Chaska a large quantity of wood, and all the wood then and there had or owned by plaintiff, but that he has no knowledge, nor has he sufficient information to enable him to form a belief, whether the quantity of wood was as stated in the complaint or otherwise, and transported and delivered the whole thereof to plaintiff at St. Paul, who duly accepted and received the same; and alleges that the work, labor and services rendered in so transporting such wood was worth the sum of \$625. Defendant denies each and every allegation in said complaint contained, except so far as the Court may construe the statements in his answer as admissions.

A motion was made at a special term of the District Court in Ramsey County, in December, 1864, to strike out the allegations of the answer in respect to the value of the services rendered in transporting the wood; and the denial upon information, &c., as to the quantity of the wood; and the denial of the allegations of the complaint except so far as the Court may construe the statements of the answer as admissions; and also to have the answer made more definite and certain. The motion was granted, with leave to amend, &c., and from the order granting such motion, defendant appeals to this Court.

L. M. BROWN for Appellant.

I.—The plaintiff sets forth a contract. The defendant admits the making of the contract, but states that it was made on Sunday, thus entirely annulling its force and effect as a contract, the defendant neither acknowledges any liability nor claims any benefit under that contract, nor is the plaintiff entitled to the one or subject to the other. *Finney vs. Callender*, 8 Minn., 41; *Brimhall vs. Van Campen*, 8 Minn., 13.

II.—The Court erred in supposing that the defendant claimed that he had earned the whole "contract price." He only claims that he has transported a large quantity of cord-wood, and that it was worth the amount that the plaintiff alleges that he has paid to him. The defendant repudiates the obligations of the contract *in toto*; he makes no allegations in his answer that he has "fulfilled the contract."

III.—The defendant has couched his denials of the quantity of wood transported in the form prescribed and allowed by the statute. The Court has no right to compel the Defendant to commit perjury by stating that positively as a fact, when he swears that he does not know whether the allegation be true or false. Of what possible benefit could it be to the plaintiff for the defendant to admit that the quantity of wood was $291\frac{1}{2}$ cords? Such an admission, even if the defendant knew it to be true, would not aid the plaintiff in proving his case. The Court indulges in a violent supposition or presumption when it assumes that the defendant, in a portion of three months, loaded upon his barge, "with his own hands," 291 cords of wood, and transported and delivered the same from Carver to St. Paul. There is nothing in the papers from which an inference can be drawn that the defendant ever saw a stick of the wood, or that he ever knew or heard of its being measured by any person. Men often perform by the hands of agents and servants, and the business of transporting large quantities of cord-wood on the Minnesota River is not an exception. *Qui facit per alium, facit per se*. There can be no

presumption that the defendant had the least personal knowledge in the premises.

IV.—The Court below says that “the defendant cannot call upon the Court to stand sponsor for his conscience.” In this respect the defendant acquiesces, but respectfully suggests that he should desire it to be otherwise, if he is to be compelled to swear positively to the existence of facts of which he personally has no knowledge or sufficient information to form a belief in order to entitle him to his day in court.

The defendant by his answer in substance says to the Court, “Here are the facts—all the facts with which I am in any manner conversant. If I am, by your construction of my statements, liable to the plaintiff, then so adjudge it to be. If otherwise, then dismiss me without day.” It is therefore respectfully suggested that the defendant has a right to submit his facts to the Court, and then to call upon the Court for a “subsequent judicial construction of the legal effect of those facts.”

V.—The Court below, after denying the right of the defendant to call upon it for a construction of the answer, proceed to construe that clause of the answer which denies knowledge or information as to whether the quantity of cord-wood at Chaska and Carver was the amount stated in the complaint, or otherwise, and applies this denial to the quantity of wood which the plaintiff says in his complaint was delivered to him under the contract at St. Paul. This construction is palpably wrong; the denial refers to the allegation of the plaintiff that he had 350 cords at Carver and Chaska. In this instance the Court “comes without calling,” and then applies an erroneous “judicial construction.” *Morton et al. vs. Jackson*, 2 Minn., R., 219.

MORRIS LAMPREY for Respondent.

I.—It is wholly immaterial in this case what the labor of the appellant in transporting the cord-wood was worth. This action is not brought to recover a *quantum meruit* for services; but to recover the value of 57½ cords of wood of the plaintiff, converted

to his own use by the defendant in April, May and June, 1864, and the complaint sets forth all the facts. *Comp. Stats.*, page 541, Sec. 70; *Id.*, 542, Sec. 76; 1 *Code R.*, 84; 2 *Code R.*, 18.

II.—The answer admits expressly the taking of the cord-wood by the defendant below; and he is presumed to know, and cannot deny any knowledge of, the quantity taken by him. A party cannot deny knowledge or information as to his own acts, and acts done by an agent are equally within the rule, and the principal is presumed to know of them. 11 *How. R.*, 163; 1 *Abbott's P. R.*, 187, 254; 10 *How. R.*, 19; 2 *Ed. Smith*, 48; *Id.*, 50; 1 *Code U. S.*, 204; 8 *How.*, 28; 12 *How.*, 153; 4 *Sand.*, 708; *Van Sand. Plead.*, 440, 443.

III.—The defendant below "cannot be allowed to deny all 'material' allegations in the complaint," or all such allegations as shall not be held by the Court to be admitted in some future and imaginary construction of his answer. This is worse than the denial of a conclusion of law; since it attempts to deny a conclusion, not yet, and which may never be arrived at, or had. Hypothetical denials are always bad in pleading. *Van Sand. Plead.*, 529; 9 *How. R.*, 543.

By the Court—BERRY, J.—This is an appeal from an order striking out certain portions of the defendant's answer. A preliminary motion was made to dismiss the appeal on the ground that it does not lie from an order of this character. The motion must be denied.

Subdivision 3, section 1, page 133, Laws 1861, gives a right of appeal "from an order involving the merits of the action or some parts thereof." The order striking out determines that certain portions of the defence set up are insufficient as stated. If what was stricken out constituted a meritorious defence and was necessary to be pleaded, then the effect of the order would be to deprive the defendant of the right to put it in evidence.

An order which may have this effect clearly goes to the merits of the action or some parts thereof. It is held in New York that all orders made in the progress of a cause involve the merits of

the action, except such as relate merely to matters resting in the discretion of the Court or to questions of practice. *Crayer vs. Douglas*, 2 Code R., 123; *St. John vs. West*, 4 How. Pr., 331; *Tallman vs. Hinman*, 10 Id., 90; *Burhans vs. Tibbitts*, 7 Id., 78; see also *Trustees Penn Yan vs. Forbes*, 8 Id., 285; *Whitney vs. Waterman*, 4 Id., 314.

On the merits we think it obvious that the allegation as to the value of the services rendered was properly stricken out. The defendant claims to repudiate the contract on which this action is brought, on the ground that the 5th day of December, 1863, when it was executed, was Sunday. Taking judicial notice of the calendar we find it to have been Saturday. As the defendant makes no other objection to the validity of the contract, and as this is an action for damages arising from an alleged breach, it needs no argument to show that having admitted the contract to be in full force, and that contract containing an agreed price for certain specified services to be rendered by the defendant, it is entirely immaterial whether the services which he actually performed under the contract were worth more or less than that agreed price. As to the portion secondly stricken out, the defendant admits that he received a large quantity of cord-wood, property of the plaintiff, and delivered it at St. Paul pursuant to the contract; but he adds that he has no knowledge or information sufficient to form a belief whether the quantity of said wood was as stated in the complaint or otherwise.

This mode of denial is plainly objectionable.

As the learned Judge of the Court below observes, "the defendant is presumed to have some knowledge, &c., as to the quantity of wood actually transported by himself. It was a large quantity he alleges before, but he does not know in this part of his answer whether it was 290½ or otherwise." If there was any special reasons why he did not know, he should have stated them or shown them in justification of his answer. See *Richardson vs. Wilton*, 4 Sand. S. C. R., 709. The last denial is also clearly bad. If a defendant chooses to adopt this general form of denial, he must still be definite and positive; he must deny what he has not ad-

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mitted. A denial of each and every allegation of the complaint, except what the Court may construe to be admitted in the foregoing part of his answer, is both indefinite and uncertain. A truthful denial implies that he knows precisely what he is denying. How can he know beforehand what construction will be put upon his pleading by the Court?

The order is affirmed and the action remanded.

JAMES CARROLL VS. THOMAS ROSSITER.

In 1858, and when only one year was allowed to a mortgagor to redeem from a mortgage sale, the plaintiff's grantor mortgaged to the defendant. In 1861, and when a mortgagor was by law allowed three years to redeem from such sale, said mortgage was foreclosed by advertisement. *Held*—that the plaintiff's right to redeem was governed by the law in force at the time the mortgage was made.

At the time of said mortgage sale the sheriff by whom it was made gave to the mortgagee, who was the purchaser, a certificate specifying among other things that the purchaser would be entitled to a conveyance in *three* years from the date of the sale. *Held*—that in this case the terms of the certificate could in no wise affect the right of either party, and that the acceptance of such certificate by the purchaser was not a waiver of his legal rights in any respect.

This action was brought in the Ramsey County District Court, for the redemption of certain real estate situate in St. Paul, sold under a mortgage foreclosure. The cause was tried by a referee, and the facts as found by him upon such trial are substantially as follows:

On the 21st day of June, 1858, one Patrick Carroll was the owner in fee of the premises, and he, with his wife, executed a mortgage thereon to Thomas Rossiter (the defendant) to secure

the payment of a promissory note for \$550 made by said Patrick Carroll, dated on said 21st day of June, payable three years after date to the order of said Rossiter, with interest at the rate of 30 per cent. per annum. Said mortgage was duly recorded. On the 21st day of June, 1859, said Patrick Carroll and wife granted and conveyed the premises to James Carroll, (the plaintiff), subject to the mortgage, and the deed was duly recorded. The said mortgage was foreclosed by advertisement, pursuant to the statute, and on the 14th day of September, 1861, the premises were sold by the sheriff of Ramsey County to the defendant Rossiter, for the sum of \$1050.00, and a certificate of such sale executed and delivered to him by such sheriff. Said certificate contained among other things the words and figures following, viz.: "And I do further certify that the purchaser will be entitled to a conveyance for the said premises on the 14th day of September, A. D., 1864, unless the same shall sooner be redeemed according to the statute." A duplicate copy of said certificate was filed in the office of the register of deeds of said county, on said 14th day of September, 1861. Afterwards, and before the commencement of this action, the usual affidavit of publication of notice, and of sale, were duly recorded in said office. On the 13th September, 1864, the plaintiff, claiming the right to redeem said premises, tendered to the defendant the sum of \$1400.00 for such redemption, which was refused by him on the ground that the time for redemption had passed, and that he regarded the property as his own.

As conclusions of law the referee found and decided:

1. That the time of redemption for said mortgage sale expired with the 14th of September, 1862.
2. That the form of the sheriff's certificate executed, filed and delivered as aforesaid, does not enlarge, alter, or in any manner affect the right, manner or time of redemption from said sale.
3. That the defendant is entitled to judgment against the plaintiff for costs, &c.

Judgment was entered pursuant to the referee's report, and plaintiff sued out writ of error.

SMITH & GILMAN for Plaintiff in Error.

I.—The power in said mortgage was only to be operative on and after the 24th day of June, 1861, upon the contingency that the note was not sooner paid. The statutes in force at the time of the maturity of the note must govern and were alone contemplated in the power.

II.—The certificate of purchase shows the terms of sale, and evidence and agreement extending time of redemption to September 14th, 1864, and cannot be contradicted by parol or defeated by statutory construction.

III.—The act of 1858, and also that of 1860, make the time to redeem commence from the time of filing the notice of sale in Register's office, or until such notice is filed (which is not done in this case,) the time does not commence to run. *Acts of 1860*, 275; *Comp. Stat.*, 646.

IV.—The amount of sale and interest thereon being tendered avoids the sale, and the defendant cannot be permitted to hold his alleged title and continue the cloud thereof.

V.—The power of sale contained in the mortgage did not confer a vested right independent of the remedy. The vested right is the authority to sell according to the statute in force at the time the power is called into being. The remedy is the action or means given by law for the recovery or assertion of a right. The extension of the time for redemption does not impair the obligation of the contract. *Stone vs. Bassett*, 4 *Minn.*, 298; *Tomlin Law Dic.*, Letter R; *Grimes vs. Bergen*, 2 *Minn.*, 89; *Jones vs. Still*, 9 *Barber*, 482; *Morse vs. Gold*, 1 *Kernan*, 282; *Butler vs. Palmer*, 3 *Hill*, 324; *People vs. Livingston*, 6 *Wendell*, 526; *Sedgwick on Constitutional Construction*, 187; 4 *Coicen*, 384; 21 *Pickering*, 174.

VI.—The power to sell does not refer to any particular law or remedy, but merely recognizes the right of the party to sell according to the statute or law existing at the time of default, so as to dispose of the equity of redemption or sale of the mortgage interest under the laws then in force.

VII.—The judgment is given for defendant, when by the law arising upon the facts it should have been for plaintiff.

BRISBIN & WARNER for Defendant in Error.

I.—The note and mortgage having been executed in June, 1858, neither the act of July 29th, 1858, nor that of 1860, can affect the rights of the contracting parties, which are determined by the laws in force at the time. *Comp. Stat. page 396, Sec. 60; Hayward vs. Judd, 4 Minn., 483; Goenen vs. Schroeder, 8 Minn., 387.*

II.—The law in force June, 1858, (*Comp. Stat., page 645, Sec. 11.*) provides that within twelve months from such sale the mortgagor may redeem, &c., &c., and *Sec. 12* of same page provides that the person making the sale shall complete the sale by making a deed, &c., unless the premises shall be redeemed as provided in the preceding section. No right of redemption existed from a statutory sale excepting by force of the law, which was made a part of the contract, and it is puerile to claim that the Sheriff may either create or in any wise impair or affect rights by the recitals of his certificate. *Vide Comp. Stat., page 645, Secs. 11 and 12.*

By the Court—WILSON, C. J.—The mortgage referred to in this action was made in June, 1858, and foreclosed (by advertisement) in September, 1861. The premises were sold by the Sheriff of Ramsey County, and bid in by the defendant (the mortgagee.)

Thereupon the Sheriff, in order to carry out said sale, made and delivered to the defendant a certificate of sale, which specified among other things that the defendant would be entitled to a conveyance on the 14th day of September, A. D., 1864, (three years from the date of the sale,) and a duplicate of said certificate was duly filed in the office of the Register of Deeds of the proper county.

But two questions are presented for adjudication, (1) whether the plaintiff's right to redeem from said sale was governed by the laws in force at the time of making the mortgage, or by the laws in force at the time of the foreclosure.

Reynolds v. La Crosse & Minn. Packet Co.

It has been settled in our State that the rights of parties in this respect are fixed by the laws in force at the time of making the mortgage. *Heyward vs. Judd*, 4 *Minn.*, 483; *Goenen vs. Schroeder*, 8 *Minn.*, 387. And we do not feel called upon to discuss, or at liberty to question, the doctrine of these cases.

The second question presented is whether the defendant, by receiving without objection the certificate of sale, which specified that he would be entitled to a conveyance in three years, should not be held to have waived his right to such conveyance sooner. I was inclined to concur in the view taken by the plaintiff in error on this point—for reasons which it is unnecessary now to give—but my brethren are clearly of a contrary opinion. We hold, therefore, that in this case the terms of the certificate can in no way affect the rights of either party, and that the defendant's acceptance of such certificate was not a waiver of his legal rights in any respect.

The judgment below is affirmed.

JAMES S. REYNOLDS vs. LA CROSSE & MINNESOTA PACKET
COMPANY.

When a foreign corporation demurs to a complaint in the District Court, it appears and thereby confers upon the Court jurisdiction over it.

The complaint contained four counts—three upon contract, one for tort. A demurrer being overruled, the clerk below made up the damages for judgment and entered judgment as upon failure to answer, and included therein the amount claimed under the fourth count of the complaint. *Held*—that this was error. *Held*—further, that this Court will correct the error without requiring application for correction to be first made to the Court below, overruling in this respect the case of *Babcock et al. vs. Sanborn et al.* 3 *Minn.*, 141.

The complaint in this action states that the defendant was dur-

ing the year 1863, and now is a corporation, duly incorporated under the laws of Wisconsin, and engaged in business in this State and elsewhere, carrying and transporting goods, &c., and for that purpose owning and running a great number of steam-boats. Four separate causes of action are stated in the complaint, the first three of which are upon contract, and the fourth is in the following words, to-wit:

"4th. For a further cause of action, the plaintiff alleges that on or about the 21st of April, 1863, the defendants, by their agents and servants, did break up and destroy about 500 feet of plank, then and there the property of the plaintiff, which plank were then and there worth the sum of five dollars, and thereby the plaintiff was damaged in said sum of five dollars."

Demand of judgment for the aggregate amount of all of said causes of action, with interest, &c.

The defendant by its attorney interposed a demurrer as follows, to-wit:

"And now the said defendant specially appears in this action for the purpose only of making the following demurrer to the plaintiff's complaint, and for no other purpose whatever:

"And thereupon the said defendant demurs to the complaint of the plaintiff in this action, and specifies the following grounds of demurrer, to-wit: That this Court has no jurisdiction of the person of this defendant, for this among other things, to-wit, that it appears by said complaint that this defendant is a foreign corporation, established by the laws of the State of Wisconsin, and has not been created by or under the laws of this State, and has in no wise become subject to the jurisdiction of a Court thereof."

The demurrer was overruled, with leave to answer. Judgment was entered by the clerk, without assessment of damages, for the amount claimed, and defendant sued out writ of error.

LORENZO ALLIS for Plaintiffs in Error.

I.—*Sec. 37, page 622, Comp. Stat.*, provides that no corporation is subject to the jurisdiction of a Court of this territory, unless it

appear in the Court, or have been created by or under the laws of this territory, or have an agency established therein for the transaction of some portion of its business, or have property therein, and in the last case only to the extent of such property at the time the jurisdiction attached.

The complaint in this case shows that the defendants below (plaintiffs in error here,) are a corporation established by the laws of Wisconsin. It does not show, nor does the record anywhere disclose, that they have property in this State, or an agency established therein, or that they have ever been served with any process, or that any legal or regular attempt has ever been made to serve them with any process.

They are not, therefore, subject to the jurisdiction of the Courts of this State.

This being the case, how are they to interpose this objection in this case? How are they to make known to the Court—to bring to the notice of the Court the fact that they are not subject to its jurisdiction? In other words, how are they to plead to the jurisdiction of the Court?

Sec. 61, page 540, Comp. Stat., directs that when this fact “appears on the face” of the complaint, the defendant must demur.

Under the old system objection to the jurisdiction of the Court was always taken by plea. There were various kinds of pleas, *e. g.*, pleas to the jurisdiction, pleas in abatement, and pleas in bar. Under our present system a technical plea is unknown. All defences are taken by answer or demurrer.

Objection to the jurisdiction of the Court is taken by demurrer, when “it appears on the face” of the complaint; otherwise by answer; but it may always be taken in the one way or the other.

But, says my learned opponent, and the learned District Judge below, under *Sec. 26, page 628, Comp. Stat.*, “A defendant appears in an action when he answers or demurs,” and having appeared in Court, a foreign corporation is subject to the jurisdiction of the Court, according to the provision of statute first above quoted.

In other words, a defendant not subject to the jurisdiction of a

Court, and wishing to interpose that objection, proceeds to do so in the way specifically pointed out by statute, and thereby waives the objection and becomes subject to the jurisdiction of the Court. Could *reductio ad absurdum* possibly be better illustrated?

Provisions of law must receive a reasonable interpretation. The appearance spoken of in *sec. 37*, which is to subject a corporation (or any other person—*see sec. 36 same page*) to the jurisdiction of the Court, must mean a voluntary appearance for the purpose of submitting to such jurisdiction, and not an appearance for the sole and exclusive purpose of objecting to such jurisdiction. In other words, it must mean a general appearance for the purpose of confessing or defending the action, and not a special appearance, made solely for the purpose of pleading to the jurisdiction of the Court itself.

To give the interpretation proposed by the opposite counsel to *secs. 36–37, p. 629, Comp. Stat.*, would entirely nullify the first clause of *sec. 65, p. 540, Comp. Stat.* In fact, with such an interpretation, neither a corporation nor a natural person could ever take objection to the jurisdiction of a Court by demurrer or answer.

There can be no doubt that the objection to the jurisdiction of the Court is properly taken, and duly raised in this case.

In conclusion it may be remarked that even when a foreign corporation have property within this State, yet such corporation are even then subject to the jurisdiction of our Courts only to the extent of such property at the time the jurisdiction attached. Now when does the jurisdiction attach? Clearly when process is served on the corporation or the property. But in the case at bar, no service of process has ever been made on either the company or their property.

The demurrer should have been sustained.

II.—The judgment was erroneously entered in this case. It was entered as in action arising on obligation for the payment of money only, whereas such is not the action. *See clause 1 of (173) sec. 165, Comp. Stat., p. 555.*

GEORGE L. OTIS for Defendant in Error.

I.—The main questions here, as conceded by counsel for plaintiff in error, arise on the demurrer to the complaint. We insist that no other questions can arise here, for no others were passed upon by the Court below, and no objection was taken to any proceeding had subsequent to the demurrer. If the counsel had objections to any such subsequent proceedings, the Court below was the proper tribunal to have passed upon them in the first instance. *Karns vs. Kunkle*, 2 Minn., 313; *Babcock & Hollinshead vs. Sanborn & French*, 3 Minn., 141; *Hawke and wife vs. Banning & Bucknell*, 3 Minn., 67; *Milwain vs. Sanford*, 3 Minn., 147. It is expressly held in the latter case that errors by the clerk in assessing damages under *Comp. Stat.*, p. 555, sec. 173, will not be reviewed on writ of error to this Court. The party must resort to the Court below in the first instance.

II.—Addressing ourselves, then, to the main question in the case, which appears from the demurrer itself to be merely this, viz: Does it appear from the complaint “that the Court has no jurisdiction of the person of the defendant?” *Comp. Stat.*, 540; and we will maintain:

First. The jurisdiction here referred to has no connection whatever with the service of process, that is, the Court will never look into the complaint to see what difficulties may be in the way of service of summons, but will leave that to be settled in the regular way and at the proper time; but the complaint, to be objectionable in this particular must show that the defendant is absolutely precluded from having a *status* in Court, that is, must show that the defendant cannot be sued at all in the Courts of this State. It will hardly be contended, since the decision in *Broom et al., vs. Galena, D. & D. & M. Packet Co.*, 9 Minn., 239, that the plaintiff in error cannot be sued here. So far as the questions that arise on this demurrer are concerned, it can make no difference what the complaint shows or what it don't show as long as it shows that the defendant is capable of being sued in this State.

Second. The counsel for the plaintiff in error, after citing *Sec. 37, page 622, Comp. Stat.*, insists that the complaint is defective in not setting out that the corporation has property within the State, or an agency therein. Protesting that this has nothing to do with the question of jurisdiction of the person of the defendant raised by the demurrer, we say—

1. The complaint in the first clause thereof alleges that the defendant owns and is using in this State a large number of steamboats. We suppose the Court will take judicial notice that steamboats are property.

2. If these objections exist to the jurisdiction of the Court the defendant must plead them. The statute expressly provides that a foreign corporation may be sued. *Comp. Stat., page 605, Sec.*

5. This is the general rule. If, under the special circumstances of this case the defendant is exempt from this general rule, it must plead them and prove them.

3. If the defendant appears in the action nothing else is necessary to confer jurisdiction, the language of the section in question being, "unless it appear in Court," or have an agency, or property, &c. The complaint cannot allege whether the defendant will or will not appear, and hence cannot show jurisdiction in all cases, nor can we look into the complaint in any case and determine from it alone this question of jurisdiction.

Third. This objection to the jurisdiction of the Court is fully answered by the demurrer itself, which is an appearance by the defendant. "A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance." *Comp. Stat., page 628, Sec. 26.* This appearance is equivalent to personal service. *Comp. Stat., page 539, Sec. 59.* The demurrer, under the code, has no force or efficacy except by the statute, and its effect is fixed by statute, and when the demurrer is put in the statute determines its meaning, and there is no room for argument or construction. It brings the party into Court just as effectually as it raises an issue of law, and for the same reason, viz: the statute has thus provided. The counsel for the plaintiff in error attempts to combat this statute, not by applying the ordinary rules

of construction, for no rule of construction can change or vary so plain a provision as this, but by showing its absurdity, and puts the case to illustrate its absurdity, in these words: "A defendant not subject to the jurisdiction of a Court, and wishing to interpose that objection, proceeds to do so in the way specifically pointed out by statute, and thereby waives the objection and becomes subject to the jurisdiction of the Court. Could *reductio ad absurdum* be better illustrated."

This argument is completely refuted by the fact that no supposed defect in a complaint which an appearance would completely cure could possibly be demurrable, that is, if a complaint is good after the defendant has put in an appearance to the action, it was equally good before that time, and was always good, and hence never demurrable, for the appearance of the defendant can have nothing to do with the sufficiency of the complaint. No such case can ever arise as a complaint showing want of jurisdiction of the person of the defendant on its face, of such a kind as would be cured by the defendant's appearance. There is but one question that can ever arise on a demurrer to the complaint for want of jurisdiction over the person of the defendant, and that is, "Can the defendant be sued in this Court?" And with this question the appearance of the defendant has nothing whatever to do.

III.—If our first proposition is good, and no errors can be assigned but such as are raised by the demurrer, then the question of regularity in the proceedings, subsequent to the decision of the demurrer, is immaterial. However, we will briefly consider the plaintiff's in error second point: "Was the judgment erroneously entered in this case?" We have already stated how the judgment was entered.

1. The form of this summons determines this question and settles it. *Comp. Stat., page 537, Sec. 50.* If the complaint did not follow the summons in stating the cause of action, then the defendant below could have had his motion to set it aside. *Rider, et als., vs. Whitlock, 12 How. Pr. R., page 209.*

2. But the complaint does follow the summons, the whole claim

being on contract or obligation for the payment of money, and the clerk in such case enters the judgment. *Comp. Stat.*, page 555, Sec. 173, Sub-div. 1. The term "obligation" in the statutes is synonymous with contract, and the term contract when used generally, as in this section, refers as well to unwritten and implied contracts as to express contracts written or otherwise.

By the Court—BERRY, J.—We have no doubt that the District Court acquired jurisdiction of the plaintiff in error.

By sec. 37, p. 629, *Comp. Stat.*, it is enacted that no corporation "is subject to the jurisdiction of a Court of this Territory unless it *appear* in Court," &c.; and by sec. 26, p. 228, *Id.*, "a defendant appears in an action when he answers, *demurs*," &c. By sec. 59, p. 539, *Id.*, a voluntary appearance is made equivalent to personal service. In this case the defendant undertook to demur specially, that is, under such protestations as to prevent the demurrer from being taken against him as a general appearance. This he could not do, for the statute, as we have seen, defines the effect of a demurrer in plain language. But the plaintiff in error insists that it is absurd to hold that where a defendant demurs to the jurisdiction of the Court over his person, the very fact that he demurs and therefore appears, gives the jurisdiction which is brought in question. But it is well settled that this ground of demurrer only embraces cases where the Court cannot under any circumstances acquire the jurisdiction. For instance, if a foreign minister were sued in one of our District Courts, he might demur for want of jurisdiction of the person, if the fact that he was a foreign minister appeared upon the face of the complaint. And so far from being deprived of the benefit of his demurrer by his appearance, he would be entitled to an allowance of his demurrer and the Court would be ousted of jurisdiction. It is also to be observed that when the plaintiff in error insists that the complaint is demurrable because certain facts which he deems necessary to give jurisdiction are not alleged, his objection is hardly within the terms of the statute. For his objection is not that it *appears* upon the face of the complaint that the Court has no juris-

diction, &c., but that it *does not appear* that it has jurisdiction, &c., which is another and a different thing, and does not furnish ground for demurrer. See *Powers vs. Ames*, 9 Minn., 178. So far as any objection to the service of the process is concerned, of course nothing could be alleged in reference to that in the complaint, and a demurrer would not reach such objection.

Without dwelling further on these points, we have no doubt that in this case to demur was to appear, and to appear was to give jurisdiction. The views which we entertain are supported by 1 *Monell's Pr.*, 540; 1 *F. & S. N. Y. Pr.*, 368; *Norris vs. Hope Mu. Ins. Co.*, 5 *How. Pr.*, 96; 3 *Code R.*, 161; 8 *Barb. S. C.*, 541; *Rider vs. Whitlock*, 12 *How. Pr.*, 209; *Flynn vs. Hudson River R. R. Co.*, 6 *Id.*, 439; 5 *Id.*, 233.

The fourth cause of action set out in the complaint was for a tort, and it was improperly joined with the three preceding counts, which were upon contract. No objection was taken to the misjoinder, but it is urged that the clerk had no authority to enter judgment upon this count. This depends upon the construction of *sec. 42, p. 562, Pub. Stat.*, and of *sec. 173, p. 555, Id.* And we think that these sections do not confer the authority exercised by the clerk in this case, and that it was error for him to enter judgment upon the fourth count. It has, however, been held in several cases by this Court (Ch. Justice Emmett dissenting) that where errors have been committed by the clerk below in making up the damages for judgment, application for correction must first be made to the Court below, and that where this has not been done this Court will not review the errors complained of. *Babcock et al. vs. Sanborn et al.*, 3 Minn., 141; *Id.*, 67, 147. But the statute gives to every party the right to remove to this Court any final judgment of the District Court, to be "examined and affirmed, reversed or modified," and however convenient it might be in many respects if a party were compelled to apply to the Court below in the first instance, for the correction of any error committed by the clerk, it must be admitted that a judgment, though it be entered up by the clerk without the knowledge even of the judge, is in contemplation of law the judgment of the

Court, and in a case like this a *final* judgment. Reluctant as we are to disturb a rule of practice established by repeated decisions of this Court, we are unable to reconcile the rule with the express provisions of law. Nor can we perceive how this Court can refuse to examine and correct the errors appearing by the return, without a plain violation of the duty imposed upon it by statute and a denial of justice. And we cannot see the authority by which a party is required to make application to the Court below in the first instance, so long as no such authority is to be found in the statute regulating the whole subject. Further discussion of this point is unnecessary, as we concur in the main with the views expressed by Ch. J. Emmett, dissenting, in *Babcock et al. vs. Sanborn et al.*, 3 *Minn.*, 145.

The judgment below is reversed, unless the defendant in error shall, within twenty days from the service of notice of this decision, remit therefrom the sum of five dollars claimed under the fourth count of the complaint and any interest which may have been computed thereon, in which case the judgment is affirmed for the residue.

V. R. LEE vs. A. S. EMERY et al.

In an action for damages resulting from the upsetting of the plaintiff's carriage, if the complaint fails to charge, either directly or by implication, that the defendant was the cause of the upset, judgment will be arrested after verdict, on motion.

This was an action commenced before a justice of the peace in Wabashaw County. Judgment was rendered in favor of the plaintiff; defendants appealed to the District Court of Wabashaw County; upon the trial in said District Court the jury empanelled

to try the same returned a verdict for the plaintiff, and thereupon the defendants moved the Court in arrest of judgment and for a new trial, on account of the insufficiency of the complaint to support the verdict; which motion was denied, and judgment entered for the plaintiff. The defendants appeal to this Court.

The portions of the complaint material to the points decided are set forth in the opinion of the Court.

SMITH & GILMAN for Appellants.

I.—The complaint does not state facts sufficient to constitute a cause of action, and therefore it was error to deny defendants' motion in arrest of judgment.

II.—The complaint being defective, the verdict does not cure it, and the judgment based thereupon cannot be sustained.

III.—The complaint upon its face shows that there was a "safe and feasible" way to avoid the collision and accident, by driving down Centre street; and shows that after leaving the street upon which said Emery was driving his vehicle, and while passing over said "safe and feasible" route his carriage was upset, which is the statement of an injury received by the accidental overturning of plaintiff's carriage, without any averment that defendant by himself or servant caused the same.

IV.—It is not averred that said George Emery was at the time of said accident the servant of said A. S. Emery. The allegation that he mostly drove said team is not sufficient. Yet judgment is erroneously given against both of said defendants.

V.—The damages are too remote.

VI.—Gross negligence is not averred, nor any wrongful or forcible act alleged. The plaintiff must himself be free from fault.
1 Am. Leading Cases, 619, note.

W. W. PHELPS for Respondent.

I.—The complaint contains every necessary averment to constitute a cause of action against the defendants. If not done so

artistically as to make a perfect pleading in phraseology, it nevertheless contains in substance every necessary or material allegation.

This is a complaint in justice court and will be liberally construed with a view to substantial justice; and the Court will disregard any error which does not affect the substantial rights of the parties. *C. S. P.*, 542 (79); *Id.*, 544 (96); also *Rules of Pleading in Justice Court*.

II.—The case having been tried without any objection either to the complaint or to any evidence introduced under it, and that evidence having resulted in a verdict which was in conformity thereto, and no motion to arrest the judgment upon the verdict, as against evidence having been made, the same must now stand, and will not be interfered with by the Supreme Court. *C. S.*, 543, sec. 90; *Id.*, 544, secs. 91, 96.

The damages (as found by the jury) are the immediate result of the acts of the defendants, and the Court will not enquire how the jury arrived at the amount.

III.—The only legitimate and fair construction that can be put upon that part of the complaint in regard to “safe and feasible way,” is that the way down Centre street was the only alternative left the said servant of Lee, and the only way left in which there was any degree of safety. Not that “the way” was perfectly and in fact safe, but that it was the safest way under the circumstances. The complaint shows that the plaintiff’s servant attempted to pursue the said way, which was his only alternative; that he exercised all the care and skill possible under the circumstances. The complaint does not show that there was a “safe and feasible way” to avoid the collision and accident.

IV.—The complaint connects the cause with the effect—shows the damages to be the effect of the carelessness and negligence, or the effect of the accident, and that the accident was caused by the carelessness and negligence of defendants.

V.—Master and servant are jointly liable for fault or negligence of servant, and carelessness and negligence are, with attendant circumstances, all that are charged in this action. See *C. S.*, p. vol. x.—25

347, sec. 5; *Hilliard on Torts*, 430, sec. 2; *Id.*, 432, sec. 3; 1 *Vol. C. T.*, 3d Ed., p. 348; *Id.*, 614, sec. 3; 2 *Stark. Ev.*, 297; 6 *Cow. R.*, 189; 19 *Wend.*, 343; 11 *John.*, 285; *E. D. Smith's Rep.*, 591; 4 *Abb. N. Y. Dig.*, 272, sec. 553.

By the Court—BERRY, J.—Our statute (*Pub. Stat.*, 540, Sec. 69,) after providing that the defendant may object to the complaint for certain enumerated reasons, goes on to say that “if no objection be taken either by demurrer or answer the defendant must be deemed to have waived the same, excepting * * * the objection that the complaint does not state facts sufficient to constitute a cause of action.” This exception would seem to have been made in harmony with the common law rule touching motions in arrest of judgment; (*Raynor vs. Clark*, 7 *Barb. S. C.*, 583;) for one of the grounds for arrest of judgment laid down by Blackstone is, “if the case laid in the declaration is not sufficient in point of law to found an action upon.” 3 *Bl. Com.*, 393. The same author says that, “many inaccuracies and omissions which would be fatal if early observed are cured by a subsequent verdict, and not suffered in the last stage of a cause to unravel the whole proceedings. But if the thing omitted be essential to the action or defence, as if the plaintiff does not merely state his title in a defective manner, but sets forth a title that is totally defective in itself, &c., * * * this cannot be cured by a verdict,” &c. *Id.*, 394, 395. “If the declaration omits to allege any substantial fact which is essential to a right of action, and which is not implied in or inferable from the finding of those which are alleged, a verdict for the plaintiff does not cure the defect.” *Gould's Pleading*, 503; see also the opinion of Justice Bronson in *Mann vs. Eckford, Ex'rs*, 15 *Wend.*, 509, and the opinion of Senator Tracy in *Addington vs. Allen*, 11 *Wend.*, 416. In the case last cited on page 387, it appears that by 2 *R. S.*, 424, (under which the New York cases cited were decided,) it is provided “that the judgment upon a verdict shall not be stayed nor shall the same be reversed for the omission of any allegation or averment of any matter, without proving which the jury ought not to have given

such a verdict," and notwithstanding the liberality of this provision, the Chancellor says: "This embraces the same class of defects which are cured by a verdict at common law, the principle of which was equally broad in this respect." * * * "But it is the duty of the jury to give a verdict for the plaintiff if he proves anything alleged or which may be implied from the declaration, and therefore if the plaintiff totally omits to state a good title or cause of action even by implication, matters which are neither stated nor implied need not be proved at the trial, and there is no room for intendment or presumption, as the intendment must arise from the verdict when considered in connection with the issue upon which that verdict was given." See also *Story on Pleading*, 72, "G;" *Van Sand. Pl.*, Ch. 9, Sec. 3. These authorities furnish the principles upon which this case should be decided.

The complaint is in many respects quite inartificial. The precedent found in 2 *Ch. Pl.*, 710, will suggest many improvements. We do not deem it necessary to consider in detail all the grounds urged by the appellant. It is very possible that several of them would be good upon demurrer, but as Blackstone says, 3 *Com.*, 394, "it is not true that everything that may be alleged as cause of demurrer will be good in arrest of judgment." To our mind the most formidable objection to the complaint is in the language of the appellants' point, that the complaint "shows that after leaving the street upon which said Emery was driving his vehicle, and whilst passing over said safe and feasible route, his carriage (that is the plaintiff's,) was upset, which is the statement of an injury received by the accidental overturning of plaintiff's carriage, without any averment that defendant by himself or servant caused the same."

The allegations of the complaint on this point are that "the said defendant, George Emery, driving the carriage of said defendant, A. S. Emery, as aforesaid, did carelessly and negligently drive across the street directly in front of the carriage of this plaintiff, at the same time snapping and shaking his reins, &c., &c., whereby it caused a collision, and to avoid the necessity of running into W. Stringham & Co.'s place of business, it became absolutely

necessary for the plaintiff's said servant to turn suddenly to the right and drive down Centre street, &c., &c., and that while thus turning and driving as aforesaid with all the care and skill possible under the circumstances, the plaintiff's carriage was upset," &c., with a statement of injuries resulting from the upset. Now, all the damages for which the plaintiff seeks compensation, he claims to have resulted from the upset, and so it is of course necessary for him to allege and show that the defendant, George Emery, was the cause of the upset. This is the very gist of the action, and without an allegation to this effect, the complaint does not state facts sufficient to constitute a cause of action. There is no statement to this effect in the complaint, nor anything from which it is inferable or to be implied. The statement in the *ad damnum* "that in consequence of said negligent and careless act of the defendant, George Emery, the plaintiff sustained great damage," giving the plaintiff's estimate of damages in money, being a mere conclusion of law unsupported by a previous averment of facts, cannot mend the matter. See *Griggs et al., vs. City of St. Paul*, 9 Minn., 248, and numerous cases cited.

The judgment of the District Court is reversed, together with the order denying the motion for an arrest of judgment, and the action remanded for further proceedings.

WHITE & MARKS vs. GEORGE CULVER.

When the case is not one of variance, but of failure of proof, under *sec. 92, p. 544, Pub. Stat.*, a motion for an amendment is addressed to the discretion of the Court under *sec. 94*, and no appeal lies from an order denying such amendment unless a gross abuse of discretion is clearly established.

The complaint in this action states in substance that the plain-

tiffs, White & Marks, had an interest in a certain judgment or decree against one A. M. Fridley, in Benton County, on the 15th January, 1856, to the amount of \$5083.58; and that in March, 1856, the plaintiffs entered into an agreement with the defendant Culver, that he should collect the amount due them in said decree on shares, and a receipt or paper was executed by said Culver, embracing the terms of said agreement; *"that on or about the 26th day of March, 1858, the said Culver acknowledged the receipt of payment of the full amount due these plaintiffs upon said judgment or decree,"* and requested and directed the attorneys for the plaintiffs in said judgment or decree to satisfy the same of record, and that *"the said judgment and decree was upon such request and direction satisfied upon the records by said attorneys."* The plaintiffs demand judgment against the defendant Culver for one-half of said sum of \$5083.58, with interest and costs. There is no allegation in the complaint that the decree against Fridley or any portion thereof has ever been paid.

The answer admits substantially the statement in the complaint respecting the recovery of the judgment against Fridley, and the agreement respecting the collection of the interest of the plaintiffs therein, but denies *"that he (the defendant) ever acknowledged receipt of payment of the amount due said plaintiffs, or claimed to be due by them, on said judgment, or any part thereof, or that he ever received said amount, or any part thereof."* The answer also denies that said judgment has ever been satisfied of record, or otherwise discharged. There was some new matter set up in the answer, not material in the statement of the case, to which the plaintiffs replied.

The cause was tried by the Court without a jury, at a general term held in Blue Earth County on the 16th of June, 1863. The plaintiffs offered in evidence a certain paper containing the title of the cause, in which the said decree was entered against Fridley, which was signed by the defendant Culver and others, and was addressed to the attorneys for the plaintiffs in said decree, which paper contains the following words: "Gentlemen: Please satisfy upon the record the decree in the above entitled cause, rendered

on the 15th day of January, 1856, against A. M. Fridley, the defendant, the same having been by him fully paid to us, March 26, 1858." The paper was admitted in evidence, under objection by the counsel for the defendant, and the plaintiffs rested their cause.

The counsel for defendant moved that the action be dismissed on the following grounds :

"1. That the plaintiffs have not established by the pleadings or by the evidence that the money has been collected by defendant.

"2. No averment of payment in the complaint."

The plaintiffs' counsel then asked for leave to amend the complaint by alleging in more direct terms "that the defendant collected the amount of said judgment." Both motions were taken under advisement by the Court, and the trial proceeded with the introduction of testimony on the part of the defence, until the whole case was closed. The Court then denied the motion to amend the complaint, and granted the motion to dismiss the action. The plaintiffs appeal to this Court.

WILLARD & BARNEY for Appellants.

I.—The District Court erred in refusing to the plaintiffs leave so to amend their complaint as to conform to the evidence. The complaint alleges that the defendant acknowledged the payment to him of the money for the recovery of which the action was brought. The written evidence signed by the defendant, established the fact that the money had been paid to him. The application was for leave to amend so as to allege payment in fact, instead of acknowledgment of payment. Though the application should be considered as addressed to the discretion of the Court, it was under our statute an abuse of discretion to refuse it. *Comp. Stat.*, 543-4, *secs.* 86, 87—(90), (91.) The proposed amendment was only to substitute an allegation of fact, in place of alleged evidence of it, and the defendant could not have been prejudiced, or otherwise than technically surprised by it.

II.—The plaintiff had assigned to defendant the decree against Fridley to collect on terms—shares. The legal title to and exclu-

sive control of the decree, was by the assignment vested in defendant, and he became trustee for plaintiffs to the amount of their share, and was bound to use and exercise all that care and prudence which the law imposes upon trustees. When he acknowledged payment of the decree, and directed it to be satisfied, he personally assumed the responsibility of the terms on which he did it. If he, on Fridley's promise, acknowledged payment and satisfaction, he, so far as the plaintiffs are concerned, took such promise as and in lieu of money, and must account to plaintiffs accordingly. He can't compel them to litigate with Fridley the fact of payment against his own written acknowledgment of it, whether it be true or false. His solemn written acknowledgment of payment and satisfaction, is conclusive between him and the plaintiff, however it may be between him and Fridley, or between plaintiffs and Fridley; for such acknowledgment is *prima facie* a complete defence to any proceeding on the decree; and the plaintiffs cannot in any manner proceed upon the decree without a re-assignment of it by the defendant to them. They can neither compel such re-assignment or be required to accept it.

H. J. HORN for Respondent.

I.—The complaint does not aver that the defendant ever collected the judgment in question or any part thereof, and the finding shows that in point of fact he did not.

II.—The complaint charges as a ground of action that the defendant discharged the judgment, and seems to claim damage thereon. No special damage, however, is averred in the complaint, and the finding shows that this judgment was never satisfied of record.

III.—The acknowledgment of the defendant, so-called, was not a discharge of this judgment; it could not operate as a satisfaction piece, and was never delivered to Fridley.

This paper will be found to be the instructions of the defendant to Mr. Becker, his counsel in the case, and intended to be Mr. Becker's warrant in case he acted under it. It was not a receipt

or release to Fridley. As an admission it was unimportant, being a communication between client and counsel." *Sec. 53, chap. 84, Statutes of Minn., p. 682.*

Mr. Becker never discharged the judgment by satisfying the judgment of record or otherwise, so that in no event are the plaintiffs in a worse position than before the paper was given to Becker.

IV.—The amendment asked for by the plaintiffs was properly refused, as there was no evidence to sustain it, (the paper given Mr. Becker was pleaded not as payment, but as a discharge of the judgment). The refusal was also discretionary and not subject of review.

By the Court—BERRY, J.—This action was tried by the Court below without the intervention of a jury. After the appellants had rested their case, a motion was made by the respondent to dismiss the action for reasons specified. Thereupon the appellants moved to amend the complaint. Both motions were taken under advisement by the Court, and the trial proceeded with the introduction of testimony on the part of the defence, until the whole case was closed. After recapitulating the facts appearing from the testimony upon both sides, and laying down his conclusions of law, the judge says: "I do not think the motion to amend the complaint should obtain. And I am clearly of the opinion that the motion for an order of dismissal of this action should be sustained, and it is accordingly so ordered." Assuming that this was equivalent to an order denying the motion to amend, as well as an order of dismissal, the first question upon which we have to pass is whether the denial of the motion is proper, or can be reviewed if it was improper. Both motions were made upon the close of the plaintiff's evidence, and we must come to a decision with reference to that stage of the trial, and have nothing to do with the testimony subsequently introduced on the part of the defence, or with the findings of the Court thereon. The counsel for the appellants insists that the denial of the motion to amend (even if the motion was addressed to the discretion of the Court) was an abuse of discretion, and cites us to *secs. 90, 91, pp. 543, 544, Pub. Stat.*

Both of these sections treat of variances, and are materially controlled by *section 92*, which reads as follows: "When, however, the allegation of the claim or defence to which the proof is directed is unproved, not in some particular only, but in its general scope and meaning, it is not to be deemed a case of variance within the last two sections, but a failure of proof." 1 *Van Sant. Pl.*, 822, 2d Ed.; *Egert vs. Wicker*, 10 *How. Pr. R.*, 197; *Texier vs. Gouin*, 5 *Duer*, 391.

In the case before us the complaint claims that the defendant had undertaken to collect a certain judgment, or interest in a judgment belonging to the complainants, on shares, and alleges, not that he had made collection, but that he had acknowledged receipt of payment, authorized his attorneys to satisfy the judgment, and that the same was thereupon satisfied of record. The evidence which was received, subject to objection for incompetency, &c., showed that the defendant had given to the attorneys a writing in which he requested them to satisfy the judgment, and reciting that the same had been fully paid. But no evidence was offered to show that this writing had ever been acted upon by the entry of satisfaction upon the record or otherwise. We take it that the most substantial allegation in the complaint was the statement that the judgment had been satisfied. There may be some reason to doubt whether the complaint was not fatally defective in omitting to set up special damage arising from the satisfaction, but waiving that, it is clear that the averment of the acknowledgment of payment was an averment of a mere matter of evidence, and not traversable or issuable, and that the other allegations were introductory. It is plain that without the averment of satisfaction the complaint failed to state facts sufficient to constitute a cause of action. When, then, the complainants failed to establish the fact of the satisfaction of the judgment, we apprehend that the case was not one of variance, but of failure of proof. If this view be correct, then the application to amend must have been made under *sec. 94, p. 544, Pub. Stat.* We have been unable to find any authority holding that where an amendment is asked for under this section, the denial of the motion will be error, review-
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able by an appellate Court, unless it is clear that the denial was a gross and palpable abuse of discretion. See, on the contrary, *Roth vs. Schloss*, 8 *Barb.*, 308; *Brown vs. McCune*, 5 *Sand.*, 229; *Hunt vs. H. R. F. I. Co.*, 1 *Duer*, 489; *Robbins vs. Richardson*, 2 *Bos.*, 256-7; *Kinam vs. Roberts*, 6 *Bos.*, 165; *White vs. Stevenson*, 4 *Den.*, 194; *Mil. & M. R. R. Co. vs. Finney*, 10 *Wis.*, 391; *Gillett vs. Robbins*, 12 *Wis.*, 331; 5 *Minn.*, 507; 8 *Minn.*, 329; 9 *Minn.*, 181. *Roth vs. Schloss*, 6 *Barb. S. C. R.*, 308, seems to be a prominent case on this subject. The facts were that the defendant had recovered a judgment against Warner and Schneider, in Albany County; that execution was issued to the sheriff of Madison County, and levied by him upon the property of W. & S., who thereupon paid the same to the sheriff. No transcript had been filed, nor had the judgment been docketed in the county of Madison. The plaintiffs supposing this omission entitled W. & S. to recover back the money paid, took an assignment of their claim and brought this action. The defendant moved for a nonsuit on the facts as above stated, and the plaintiff offered to amend his complaint so as to allege that the money was paid "in mistake and misconception of the facts, and supposing the execution to be a legal and valid process," and to make proof accordingly. This offer was made first under sections 145 and 146 of the New York code, corresponding to sections 90 and 91 of our code, and secondly under section 149, corresponding to section 94 of our code, and denied in both cases. On appeal from an order denying a new trial, Gridley, Justice, says: "The question of amendment did not arise under sections 145 and 146 of the code. There was no variance in the case. There was an omission of the entire allegation offered to be proved. It was, therefore, a case under the 149th section, and the motion should not have been granted unless it clearly appeared that to grant it would be in furtherance of justice. * * * But we do not think that the denial of a motion to amend, where the law reposes a discretion in the judge, is an appropriate ground of exception. To sustain an exception for a refusal of the judge at the trial to allow an amendment of the complaint, the party must show a clear case of

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unquestionable right, and that case seldom occurs except under the 145th section. See also *Catlin vs. Hanson*, 1 *Duer*, 327; *Texier vs. Gouin*, 5 *Duer*, 391; *Poirer vs. Fisher*, 8 *Bos.*, 263; *Kelsey vs. Western*, 2 *Coms.*, 507; *Van Sant. Pl.*, 2d *Ed.*, 822-3, and cases cited *supra*.

There is nothing in the case before us to show any gross abuse of discretion in refusing the amendment. It was very easy for the plaintiffs to have ascertained whether the judgment had been satisfied of record or not, and if they saw fit to commence their action and draw their complaint without first ascertaining a fact of that nature and importance, they certainly have not placed themselves in a position to insist upon the favor of an amendment, after an answer has been put in denying the satisfaction of the judgment, followed by a reply on their own part, and after they have brought the defendant to trial, introduced their evidence and rested their case. Failing to establish the satisfaction of the judgment, the motion to dismiss was properly granted. *Van Sant. Pl.*, 822-3, and cases cited; *Pub. Stat.*, 554, sec. 170, subdiv. 3. Although the question is not, perhaps, necessarily before us, we do not see how, upon the evidence as reported in the case, and the findings of fact by the Court, the plaintiffs could recover even if the amendment had been allowed, and upon the merits of the whole case.

The order denying the motion for a new trial is affirmed.

JONATHAN S. FISH vs. PETER BERKEY et al.

Section 7, Ch. 87, page 543, *Pub. Stat.* is repealed by Sec. 4, Ch. 11, *Col. St.*

An agreement was entered into between several persons whereby certain personal property was conveyed for specified purposes and trusts to several parties, one of whom was made trustee for the others. In an action brought by

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the party who owned the property at the time of the conveyance, (and to whom any surplus remaining after the trusts were fulfilled was to be paid,) for an accounting and payment over; *Held*—that all the parties to the agreement having a subsisting interest should be made parties to the action.

This action was commenced by Jonathan S. Fish, plaintiff, against Peter Berkey, John R. Irvine, George Culver, Fenner & Crumby, E. W. Eddy, Charles C. Lund, Robert A. Smith, J. W. Selby, John Nicols, T. R. B. Eldridge, George Gruber, A. Von Glahn, and Peter Berkey, Trustee, for aforesaid defendants. The complaint alleges substantially that on the 24th day of April, 1861, plaintiff and Samuel and James Mayall were in the possession of certain furniture of the value of \$27,662.50; the plaintiff as owner, the Mayalls as a pledge to secure \$4,000, and Samuel Mayall against liability as maker of a promissory note, endorsed by Stephen Long and owned by defendant, Von Glahn, on which \$3,719 was due. That defendants Berkey, Irvine, Culver, Fenner & Crumby, Eddy, Lund, Smith, Selby, Armstrong, Nicols, Eldridge and Gruber as parties of the second part, entered into a contract in writing with the plaintiff, the said Mayalls, and Stephen and Edward Long, as parties of the first part; whereby said *parties* of the *first part* for the nominal consideration of \$7,719, and to secure to the parties of the second part the sum of \$5,000, advanced by them, \$4,000 to pay said Mayalls' claim, and \$1,000 on said Von Glahn note, and to secure the balance due on said note, sold and conveyed said furniture to said parties of the second part, and whereby the said *Longs* were to open and keep a certain hotel in St. Paul, known as the Winslow House, and whereby the *parties* of the *second part* leased to said Longs for six months, a certain portion of said furniture therein specified of the value of \$18,838, at the rent of 10 per cent on the said sum of \$7,719, less the amount that should be paid thereon by a sale of the residue of said furniture, and whereby the *plaintiff* agreed to have that portion of said furniture leased insured in the sum of \$8,000 against loss by fire, and to assign the policy of insurance to the trustee of the parties of the second part, for their use within ten days after said Longs should take possession thereof, and to keep up such

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insurance during the term of said lease, and of any renewal thereof, and whereby *it was mutually* agreed by the *parties thereto*, that the remainder of said furniture of the value of \$8,724.50, should be sold by the agent of said parties of the second part, in the manner he deemed best for the interests of the parties, and of the net proceeds \$1,000 should be paid on the Von Glahn note, and the residue applied *pro rata* upon the balance due on said note, and said advance of \$5,000, and that the furniture so leased should be reconveyed to plaintiff if within six months thereafter he should pay the balance of said advance then due, the amount then due on the Von Glahn note, and \$572.25 with interest, &c., to Peter Berkey; and that if default should be made in the conditions of said lease, or in the payment of said sums of money, or either of them, then the parties of the second part, their agent, or trustee, should take possession of said furniture, and sell the same in manner as the parties of the second part, or their agent, or trustee, might determine, and in case of sale the proceeds should be applied *pro rata* to the payment of said advance, and the balance due on the Von Glahn note, and out of the residue the said sum to Peter Berkey, and the balance if any to plaintiff; that Peter Berkey should be the agent, and trustee of the parties of the second part, with full powers to act for them. The complaint further alleges the filing of said contract as a chattel mortgage, that said \$5,000 was advanced, and disbursed according to the contract, and said furniture leased with a portion of the residue, (with the consent of the parties,) and said hotel opened and kept, and the rents of said furniture paid, and that plaintiff caused said furniture to be insured in the sum of \$8,625 in manner as agreed; that said trustee accepted the trusts, and entered upon the duties specified in said contract; that at the expiration of six months said contract was renewed and continued in force by the consent of all the parties; that said rents continued to be paid and received pursuant to said contract; that said insurance was kept up by plaintiff, and on the 11th day of October, 1862, said contract was in full force, and then acted upon and under by all the said parties; that on that day a portion of said furniture so leased of the value of \$14,119.14

was accidentally destroyed by fire, and the balance injured thereby to the sum of \$931.06; that said parties of the second part did not attempt to recover the full amount of said insurance, and did not cause to be made a true statement of said loss and damage, but caused statements thereof to be rendered to the insurers, which they, and said trustee well knew to be false, and too low, and they and said trustee in bad faith compromised with the insurers for \$4,343.94, and converted the residue of said furniture saved from the fire of the value of \$4,217.06, to their own use; that said parties of the second part have received from sales, &c., of the portion of said furniture not used in said hotel, \$8,724.50; from rents from said Longs, \$4,225.31; that plaintiff has often demanded of said defendants, and said trustee, an account of their doings, and that they pay over to him such sum as he is entitled to; that they refuse to account, or pay over any sum whatever. Said complaint demands that defendants and said trustee be required to render an account of their doings, that they may be charged with the full amount of said insurance, and that they may be adjudged to pay over to plaintiff the balance found due him. To this complaint the defendants demurred upon substantially the following grounds: First, defect of parties defendant, in that Samuel Mayall, James A. Mayall, Stephen Long and Edward H. Long were not made parties defendant. Second, because several causes of action have been improperly united therein, to-wit: one against a defendant as trustee, with one against him personally; a cause of action against a defendant as trustee, with one against other defendants personally. Third, because the pretended causes of action are not separately stated therein, and do not belong to any one of the classes authorized by statute. Fourth, because said complaint does not state facts sufficient to constitute a cause of action.

The demurrer was sustained by the Court below, and judgment against the plaintiff entered therein. Plaintiff sued out a writ of error, and removed the cause to this Court.

BRISBIN & WARNER for Plaintiff in Error.

MORRIS LAMPREY for Defendants in Error.

By the Court—BERRY, J.—Subdivision 7 of section 87, page 543 of the compilation, known as "The Public Statutes," was repealed by section 4, of chapter 11, of the Collated Statutes, 1853, so that there is now no statutory provision forbidding the joinder of a claim against a trustee, with a claim against the same person in his individual capacity or against other persons. It would appear then that whatever questions arise in this case in reference to the joinder of different causes of action, can only be determined in view of the first subdivision of section 87, and on general principles. Under this first subdivision a plaintiff is authorized to unite several causes of action in the same complaint, when they relate to "the same transaction or transactions connected with the same subject of action." In construing this subdivision in *N. Y. & N. H. R. R. Co. vs. Schuyler et als.*, 17 *N. Y.*, 604, Comstock, Justice, says: "Its language is, I think, well chosen for the purpose intended, because it is so obscure and general as to justify the interpretation which shall be found most convenient and best calculated to promote the ends of justice. It is certainly impossible to extract from a provision so loose and yet so comprehensive any rules less liberal than those which have long prevailed in courts of equity." The object sought to be attained by the plaintiff in this action is the recovery of whatever surplus may be coming to him under the agreement set out in the complaint and as preliminary to such recovery an accounting. Now, assuming that Berkey was a trustee, or a trustee *sub modo*, it was entirely proper that his co-defendants *cestuis que trust* should be made parties to this action, first, because they are interested in the account. *Story Eq. Pl.*, sec. 219; *Barbour on Parties*, 356, 354, 529, 530. They had advanced the sum of five thousand dollars to be applied to certain specified purposes, and for this advance they were to be reimbursed out of the proceeds of the furniture &c., and there is nothing to show that they have been reimbursed. Secondly, by the terms of the agreement these *cestuis que trust* seem to have been invested with power, concurrently with the trustee,

to make sales, &c., and to have been subjected to the obligation to pay over any surplus to the appellant. Thirdly, so far as Berkey was concerned as an individual aside from his right to be reimbursed on account of the advance of five thousand dollars, he was also interested in having his private claim for \$572.25 satisfied from the proceeds of the sale, &c. Fourthly, a judgment for or against Berkey as trustee in a suit against him alone would not bind the *cestuis que trust* so as to protect him from future litigation instituted by them. Story lays down the general principle as follows: "It is the constant aim of courts of equity to do complete justice by deciding upon and settling the rights of all parties interested in the subject matter of the suit, so that the performance of the decree of the court may be perfectly safe to those who are compelled to obey it, and also that future litigation may be prevented." *St. Eq. Pl.*, sec. 72.

The existence and amount of a surplus under the agreement upon which this action is brought, depend upon the amount which was first to be paid out of the proceeds of sales, &c., and the fact whether that amount had been paid; and Berkey, as trustee, had a right to insist that these matters should be adjudicated in such a way as to afford him protection. By the same reasoning we are led to the conclusion that Samuel Mayall and Stephen Long should have been made parties to the action. It appears from the complaint that Samuel Mayall was the maker and Stephen Long the endorser of the Von Glahn note, and by the terms of the agreement this note was to be paid in whole or in part as the proceeds of sale, &c., would permit. The complaint does not show that the note has been paid. Now, Mayall and Long not only had an interest in having that note paid, so as to exonerate them, but Berkey could properly insist that their rights to the funds in his hands, and the fact whether the note had been paid or not, should be settled and adjudicated upon. *Dias vs. Bouchand*, 10 *Paige*, 458; *Bailey vs. Ingee*, 2 *Id.*, 278; *Dart vs. Palmer*, 1 *Barb. Ch.*, 98; *St. Eq. Pl.*, 138; *Barb. on Parties*, 326.

So far as the joinder of different and inconsistent causes of action is concerned, we apprehend that a fair and liberal construc-

tion of the pleadings as required by the code, will lead to the conclusion that there is really but one object sought by the complaint, and that is the recovery of such surplus as an accounting shall show the plaintiff entitled to. The different allegations of the complaint bear upon this one subject. In the language of the statute, they relate to "the same transaction or transactions connected with the same subject of action." In order to a full and complete investigation of the matters upon which the plaintiff's rights rest, it was proper for him to set out the several acts and facts upon which he based his claim to a surplus, for the very existence as well as the amount of a surplus depended upon these acts and facts. We think this is the effect of the complaint. It is very possible that the complaint may contain irrelevant and redundant allegations, and that some of the grounds upon which the amount of the surplus is made to depend may be untenable, but if that be the case the complaint is not for that reason demurrable. *Fellows vs. Fellows*, 4 Cowen 682; *Boyd vs. Hoyt*, 5 Paige, 65; *Van Sant. Pl.*, 2d Ed., 149; *N. Y. & N. H. R. R. Co. vs. Schuyler*, 17 N. Y., 592; *Brinkerhoff vs. Brown*, 6 John. Ch., 139; *Barb. on Parties*, 329; *North et al. vs. Bradway et al.*, 9 Minn., 183.

The averments of negligent and fraudulent dealing in reference to the insurance (which appears by the complaint to have been effected for the benefit of all parties) and of conversion of the furniture and its proceeds, &c., (though, perhaps, somewhat inartificial), may, we think be fairly construed as amounting to substantial allegations of breaches of the agreement upon which this action is founded, and it is not necessary to hold that they charge the defendants with a tort or torts, independent of the breach of agreement, so as to establish a misjoinder of action. As to Edward Long and John Mayall, we cannot conceive what interest, upon the facts stated in the complaint, they can have in the proceedings, nor why they should be made parties. Edward Long was simply a lessee, and the only interest which John Mayall appears to have had at any time arose from his lien on the furniture

as security for the debt of four thousand dollars. That debt is alleged in the complaint to have been satisfied. *Hillman vs. Hillman*, 14 *How. Pr. R.*, 460; *Waldo vs. Doane*, 2 *Ch. Sent.*, 7. The instrument upon which this action is founded is *sui generis*. It is not an ordinary chattel mortgage. There was a sale of the property, with a right on the part of the seller to a reconveyance on certain conditions, and by its terms as set out in the complaint (the whole instrument itself not being before us) certain trusts were created and certain payments were to be made from the proceeds of the property conveyed, and in case the reconveyance was not made upon the fulfillment of the prescribed conditions, the parties of the second part and their agent or trustee were required to make sale of the property and pay over to the plaintiff whatever surplus remained after making the several payments in the instrument enumerated. Under this state of facts it is not necessary to meet the position taken by the counsel for the defendants, that the absolute ownership of the property conveyed was in the defendants, and so the plaintiff had no interest in it, and for that reason cannot maintain this action.

The plaintiff does not seek to recover that property *in specie*, but proceeding upon the basis that he had lost his right to a reconveyance by a non-performance of the conditions upon which that reconveyance was to depend, he seeks to recover a surplus arising from the proceeds of sales, &c., which the defendants were required to make in case of his non-performance, and his right to that surplus in no way depends upon his title to the property itself but upon his interest in its proceeds under the agreement. As it appears, however, that Stephen Long and Samuel Mayall should have been made parties to the action, the demurrer must in that respect be sustained.

Demurrer sustained and action remanded for further proceedings.

[The decision in the foregoing action having been rendered under the mistaken impression that the case had been brought to

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the Supreme Court by appeal from the order sustaining the demurrer below, instead of by writ of error, the order entered therein was afterwards vacated and the judgment affirmed.—
REPORTER.]

ARTEMUS T. SHARPE vs. HIRAM ROGERS.

A written instrument in which the obligors undertake "to execute and deliver to each and every lot owner who may have title thereto from Joseph Briesson and wife, or from either of them in any portions of lot known as lot four, section 29, town 111, north of range 10 west, State of Minnesota, a good and sufficient deed in fee simple with all proper covenants of warranty, whenever hereafter a patent shall be issued for said lot 4 to said Pauline Monette," &c., is void for uncertainty as to the property to be conveyed by the deed.

This action was commenced in the District Court of Wabashaw County to recover the possession of certain real estate in said county, to which the plaintiff claims title from the United States through Pauline Monette and Oliver Monette, her husband, to-wit: a certain portion of lot 4, section 29, township 111, north range 10 west. The defendant in his answer alleges that before said Pauline Monette received a patent for said lot 4, one Joseph Breisson was in the possession of the same, and claimed a right to the patent; that by virtue of such claim said Briesson had sold and conveyed certain portions thereof to different individuals, and among others to one James Kirkman and Duncan McKenzie, the lands, the possession of which is in dispute in this action, who conveyed to one Lyman M. Gregg, who conveyed to defendant; that the said Pauline Monette, and her husband, for the purpose of adjusting differences and disputes and settling with those who claimed title to any portion of the said lands by conveyance from Joseph Breisson, and of avoiding their opposition to her obtaining the patent, and for other good and sufficient consideration, togeth-

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er with the plaintiff, duly executed under their hands and seals, the following agreement in writing, to-wit :

"Know all men by these precepts, that we, Oliver Monette and Pauline Monette, wife of said Oliver Monette, of the county of Wabashaw and State of Minnesota, do hereby bind ourselves, our heirs and legal representatives, to execute and deliver to each and every lot owner, who may have title thereto from Joseph Briesson and wife, or from either of them, in any portions of lot known as four (4), section 29, town 111, north of range 10 west, State of Minnesota, a good and sufficient deed in fee simple with all proper covenants of warranty, whenever a patent shall be issued for said lot 4 to said Pauline Monette on reasonable demand, and the payment of fifteen dollars to meet the expenses made in the premises. And we, Oliver Monette and Pauline Monette, as heretofore do expressly empower our attorney in fact, Artemus T. Sharpe, to execute on his part in our name for us all such deeds and conveyances as may be in any way requisite to carry out the true intent and meaning of this agreement.

"In witness whereof we have hereunto set our hands and seals this 19th day of November, A. D., 1859.

HIS
OLIVER X MONETTE, [SEAL.]
MARK.

Executed in the presence of
L. GILBERT, }
J. A. CRESWELL." }

HER
PAULINE X MONETTE, [SEAL.]
MARK.

Here follows an acknowledgment in usual form :

"I, Artemus T. Sharpe, of the town aforesaid, county of Wabashaw, State of Minnesota, attorney in fact for Oliver Monette and Pauline Monette, his wife, do hereby bind myself, my heirs and legal representatives to do all and every thing necessary to carry out the above written instrument, and to secure to said lot owners a good and sufficient title to the above described portions of land.

"Given under my hand and seal this 19th day of November.
A. D., 1859.

ARTEMUS T. SHARPE, [SEAL.]

"Signed, sealed and acknowledged in the presence of

"T. L. GILBERT,
"J. A. CRESWELL."

Here follows an acknowledgment in usual form.

He also alleges a tender of the amount to be paid under this agreement and interest, and a demand for a conveyance from plaintiff of the lands in dispute, and his refusal. The plaintiff demurred to this answer upon the following among other grounds:

"That said agreement alleged therein is void for uncertainty and other defects.

"That said answer does not state facts sufficient to constitute a defence to the cause of action alleged in the complaint."

The demurrer was brought on for hearing at the December term, 1863, of said Court, and was sustained by the Court. The defendant appeals to this Court from the order sustaining the demurrer.

SMITH & GILMAN for Appellant.

The position that the bond is void for uncertainty, that is, that no one is specially named as the obligee, is not well taken; for the obligees, or those for whose use and benefit the bond was executed, are clearly and sufficiently indicated and pointed out. A bond or deed that designates the obligees or grantees, by any general description, is binding; as where it is to "the children," or "heirs," or "heirs of the body," &c. *Shaw vs. Lond*, 12 *Mass.*, 448; 4 *Kent. Com.*, 9th *Ed.*, page 540. "It is not necessary that the parties should be expressly named." 1 *Hilliard on Vendors*, 52. "A bond to convey lands to a board not *in esse* is not void, by reason of the want of a grantee." *Sargeant vs. The State Bank*, 4 *McLean*, 339, and same case in 12 *How.*, 371. "Any writing that sufficiently identifies the parties and describes the land," is binding. *Chiles vs. Conley*, 2 *Dana*, (*Ky.*) 21; *Gray vs. McClure*, 11 *Harris*, (*Pa.*) 447.

The grantees of Briesson and wife to the land mentioned, are as clearly designated and pointed out with as much certainty, and are as easily ascertained, as the "children," or "heirs," or "heirs of the body," of a person named. In fact, the matter is left in no uncertainty whatever. There is not the least difficulty in deter-

mining who are entitled to the benefit of the bond, so far as it purports or was intended to secure rights or benefits to any one. The defendant by his answer, brings himself within the class for whose benefit the bond was made.

There is no difficulty in ascertaining the land to be conveyed. They are to convey "any portion" of lot 4, &c., to any one having title "thereto," that title to "any portion" of said lot 4, from Briesson and wife.

The defendant is entitled to a specific performance of the bond.

Specific performance will be decreed against a party binding himself, though the agreement be only signed by him. *Rogers vs. Saunders*, 16 *Matne*, 92, 97; *Gitshell vs. Jewett*, 4 *Greenl.*, 350; *Lanney vs. Cole*, 3 *Green Ch.*, 229, (*N. J.*); *Closen vs. Bailey*, 14 *John.*, 485; *Ballard vs. Walker*, 3 *John. Cases*, 60; *Laton vs. Glade*, 7 *Vesey*, 275; 2 *Hilliard on Vendors*, 189, note (A), and 307.

The plaintiff personally covenants under seal, (which imports a consideration,) that he personally will "do all and every thing necessary to carry out" the bond of Monette and wife. He does not covenant that they shall carry out the bond, but that he will. This makes it his bond as much as theirs. But he further binds himself also, personally, "to secure to said lot owners a good and sufficient title to the above described portions of land."

This is his personal covenant and is binding upon him, and if the legal title comes to him, as it has done, the Court will compel him to convey it "to said lot owners," in compliance with and to satisfy his bond.

J. B. DAVIS and MASTERSON & SIMONS for Respondent.

I.—No person or persons are named, or sufficiently described, to whom the sale is to be made. As to names the paper is absolutely silent. It is absolutely impossible for the Court to ascertain from the instrument itself, or from any paper to which it refers, who is entitled to any portion of the lot of land therein described. The paper is not only uncertain upon this point, but it

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is absolutely dumb. Not the least reference is made by name, sex, color or age, to any person to whom the land is to be sold. How can the Court tell from anything in this agreement, that the defendant Hiram Rogers is to have a portion of the land, or has any more right to it under the agreement than any other person? There is nothing in the agreement that distinguishes Hiram Rogers from any other man that ever lived, or that ever will live. He is not named, and there is not the least allusion to him. The instrument in question is not a contract. It has not the elements of a contract. There are no parties to it. It is perhaps not necessary under the statute that the contract should be signed by both parties, but there must be parties upon both sides, and they must be named in the contract. The contract must show who they are. The most essential element of a contract of sale, viz., the name of the party to whom the sale is to be made, is entirely omitted in this instrument.

The instrument itself does not even purport to be a contract between parties. It is not even an offer, for no person is named to whom an offer is made. The most that can be said in its favor is that it shows a willingness on the part of the signers to enter into negotiations with some person or persons—nobody knows who, in relation to the land therein described. But the offer was not accepted; the negotiations have never been entered into. The statute requires that the contract, or some note thereof, be in writing. This means that all the essential terms of the contract shall be in writing. There can be no more essential term or part of a contract for the sale of land than the name of the vendee. In this case no vendee is named in the contract, and for that reason we submit that it is void under the statute of frauds.

II.—In this instrument there is no description whatever of the property that is to be sold. The only words describing the property to be sold are these: "any portions of lot known as lot 4, section 29," &c. The only thing known with any degree of certainty as to the property to be sold is, that it is situated in lot 4, section 29, town 111, north of range 22 west, in the county of Wabashaw and State of Minnesota. It does perhaps appear that

the whole of lot four is not to go to any one individual, but what particular portion is to go to one individual, and what to another, cannot be ascertained from this instrument. What more right has Rogers to lot one, in block six, (the property in dispute), than he has to any other lot? This question can't be answered from an inspection of the agreement, nor of any paper to which it refers. How can any Court say that it is carrying out the intention of the agreement by declaring this particular "portion" of lot four to be the property of the defendant?

Who can tell how large a piece of land a "portion" is? (This is the word used in the card.) Or in what part of this lot four it is situated? Or who can tell that the lot in dispute was the "portion" that was to go to Rogers? Suppose some other person happened to have been in possession of this lot one instead of Rogers, could not he claim it as his "portion" under the agreement with as much plausibility as Rogers?

The contract makes no distinction between "portions," any more than it does between names or persons, for it describes neither. It is impossible for a Court to compel the specific performance of a contract for the sale of land, unless the contract itself contains such a description of the land as distinguishes it from all other land. This lot 4 is divided up into blocks and lots. There is nothing in this agreement that refers to any one lot or block more than to an other, or to anything by which any one lot can be identified, or that identifies lot one in block six as the property of the defendant, or as the property that was to be sold to him. There is nothing in the agreement to show that Rogers has any better right to this lot than to any other, or than any other "lot owner."

In short, there is not the slightest reference in this document to Hiram Rogers, nor to lot one, nor to any land that is to be sold to him. If there is any one particular in which a contract for the sale of land in which a court of equity is called upon to enforce specifically, that should be more certain than another, it is perhaps in relation to the description of the land that is to be sold. The Court will never interfere unless the particular land to be conveyed is described in the contract or in some paper

to which it refers. The whole contract is to be in writing under the statute of frauds, and if the contract does not contain such a description of the land to be sold, as to distinguish it from other lands, it is not a compliance with the statute. If this contract is to be enforced by the Court, the Court must ascertain the land to be sold, and the person to whom it is to be sold by parol, which is the very thing prohibited by the statute, and which would render the statute a nullity.

We further submit, that there are no words in this bond descriptive of the land to be sold, they are only descriptive of the party to whom the land is to be sold. They refer to the former—and not to the land.

We therefore submit that the whole contract is in this respect totally defective. *Fry on Specific Performance of Contracts*, pp. 83, 84, 85, 88, 90, 91, 123; *Sugden's Vendors and Purchasers*, Vol. 1, pp. 104–5, 111; *Parkhurst vs. Van Cortlandt*, 1 Johns. Ch. R., 273; *Bailey vs. Ogden*, 3 Johns. R., 418; *Brodie vs. St. Paul*, 1 Vesey, Jun., 333; *Clainen vs. Bailey*, 14 Johns. R., 437; *Jackner vs. Corey*, 18 Johns. R., 385; *Aberl vs. Radcliff*, 13 Johns. R., 296; *Jackner vs. Parkhurst*, 4 Wend., 319; 4 Bacon's Abridgement, 508; *Pipkin vs. James* 1 Humph., 325.

III.—The instrument set up in the answer in this case is not only in itself entirely incomplete, uncertain and insufficient, under the statute of frauds, but it contains no reference whatever to any other paper or writing by which it can be made certain and sufficient.

By the Court—BERRY, J.—This is an appeal from an order sustaining a demurrer to the answer of Rogers the defendant below. In setting forth his defence, the defendant relies upon an instrument in writing which he claims to be a sufficient compliance with the statute of frauds. Our statute declares that every contract, &c., for the sale of any lands or any interest in lands shall be void, unless the contract or some note or memorandum thereof, &c., &c., be in writing, &c., &c. *Pub. Stat.* 457, *Sec. 8*. Parsons defines a contract to be “an agreement between two or more
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parties for the doing or the not doing of some particular thing." 1 *Pars. Con.*, 5th Ed., 6. Whatever may be the precise obligations of Sharpe under the instrument signed by him, they of course depend upon the instrument executed to the Monettes in which they assume to bind themselves, heirs and legal representatives in their own language, "to execute and deliver by each and every lot owner who may have title thereto from Joseph Briesson and wife, or from either of them, in any portions of lot known as lot four (4), section 29, town 111, north of range 10 west, State of Minnesota, a good and sufficient deed in fee simple with all proper covenants of warranty, whenever hereafter a patent shall be issued for said lot 4 to said Pauline Monette on reasonable demand, and the payment of fifteen dollars to meet the expenses made in the premises." This quotation comprises all that is contained in the instrument touching the description of the property to be conveyed, or the persons to whom conveyance is to be made. And a careful reading of the instrument fails to discover any intimation as to what property was to be conveyed by the deed agreed to be executed. Upon this point the instrument is absolutely dumb. We are left entirely in the dark as to whether the Monettes undertook to convey to each "lot owner who may have title thereto from Joseph Briesson," the particular lot to which he had title in that way or some other lot or tract of land or other property. The agreement is simply to execute and deliver a good and sufficient deed without specifying what that deed is to convey. This certainly is not an agreement "to do some particular thing," and so not a contract either within or without the statute of frauds. We have great doubt whether the instrument is not also void upon several of the other grounds urged by the counsel for the respondent, but we deem it unnecessary to go into any examination of them. The order sustaining the demurrer is affirmed. Leave having been granted below to the defendant to apply for permission to file an amended answer, the case is remanded for further proceedings.

GEORGE W. THAYER vs. SYLVANUS COLE.

Under the State Constitution, the District Court is a court of general jurisdiction, and has original jurisdiction in civil actions, although the amount in controversy may be less than one hundred dollars.

This action was commenced in the District Court of Le Sueur County. The complaint sets out for a cause of action, an alleged indebtedness of \$37.10.

To this complaint the defendant interposed a demurrer, wherein he specified as a ground of demurrer, "that the amount claimed by the plaintiff of the defendant, being less than one hundred dollars, said complaint on its face does not confer jurisdiction on this Court to hear, try or determine said action, the pretended cause thereof being one of simple contract."

The demurrer was brought on for argument at a regular term of said District Court, in September, 1864. The Court overruled said demurrer. From the order overruling the same the defendant appeals to this Court.

COX & GRIFFIN for Appellant.

AUSTIN & WARNER for Respondent.

By the Court—WILSON, C. J.—The only question in this case is whether the District Court has jurisdiction where the amount in controversy does not exceed one hundred dollars. This question has been settled in *Agin vs. Heyward*, (6 Minn., 110), and *Cressy vs. Gierman*, 7 Id., 407.

Order of the Court below affirmed.

[This case was decided before Judge Berry took his seat on the bench.]

**SAMUEL WILSON, Appellant, vs. C. H. McCORMICK & BROTHERS,
Respondents.**

In an action to reform a written contract and for damages for its breach, the jury rendered a special verdict for the plaintiff, and subsequently to the verdict the plaintiff by leave of Court amended his complaint, setting forth as the real contract, one different from that found by the jury to be the true one; *Held*—that on a motion for a decree of reformation of the contract in accordance with the complaint as amended, the motion was properly denied.

This action was brought in the District Court of Fillmore County. The second amended complaint sets out a contract made between the plaintiff and the defendants, the defendants acting through their duly authorized agents, as follows: "The plaintiff agreed with the agents of the defendants, to *purchase* of the defendants a good four horse self-raking, reaping and mowing machine, of the kind manufactured by the defendants, and to pay therefor to the defendants the sum of \$200, which was to be paid in installments, and also to pay freight and charges on the same, not exceeding six dollars, from the city of Chicago to Winona, Minnesota, when the same should be delivered to the plaintiff; that the defendants, by their agents, in consideration of said agreement on the part of the plaintiff, then and there *sold* said machine to the plaintiff, and agreed with the plaintiff to have the same with the usual extras, at said Winona, ready to be delivered, and to deliver the same to the plaintiff, at said Winona, on or about June 20th, 1883, and to give plaintiff timely notice of the arrival of said machine at Winona, and of their readiness to deliver the same." The said complaint further alleges that the agent of the defendants drew up a written order to the defendants for the said machine, containing, as plaintiff then believed and was informed by said agent, the terms of said agreement which was signed by

plaintiff; that the defendants by their agents, then and there, gave to plaintiff a written acceptance of said order, and agreed to give the plaintiff timely notice of their readiness to deliver said machine at Winona. The said complaint further alleges that the plaintiff is informed and believes, that the terms of said contract are not correctly stated in said written order in this: "that the same contains a request by the plaintiff to defendants, to *manufacture and ship* for plaintiff on or before June 20th, 1863, one of said machines to the care, &c., * * Winona," and in that, "the terms of said contract—to have said machine with the usual extras, at the city of Winona, ready to be delivered and to deliver the same to the plaintiff at Winona, on the 20th day of June, 1863, * * * and to give the plaintiff timely notice of the arrival of the same at Winona, and of their readiness to deliver the same, are wholly omitted in said order;" that said inaccuracies occurred by mistake; that plaintiff did not discover said mistakes until the September following. The said complaint then alleges the plaintiff's readiness, and defendants' failure, to perform said contract; then follows the *ad damnum* clause, and the prayer for reformation of the said order, so that it shall express the terms of the contract made by the parties, and for damages sustained from its non-performance. The answer of the defendants denies the allegations of the said complaint respecting the contract made, and the mistakes in the written order, and alleges that the plaintiff ordered of the defendants one of their machines, and sets forth a copy of the order, which contains a request by the plaintiff to the defendants to *manufacture and ship* for plaintiff on or before June 20, 1863, one of their machines, &c., and does not contain any clause requiring defendants to have said machine with the usual extras at the city of Winona, ready to be delivered, and to deliver the same to the plaintiff on the 20th day of June, 1863, and to give the plaintiff timely notice of the arrival of the same at Winona, and of their readiness to deliver the same. Said answer further sets up a counter-claim, on which issue is joined by the reply. On the trial of said action the Court directed the issues in relation to the alleged mistakes in the terms of the contract, or order, signed

by the plaintiff, to be tried separately by a jury. The jury returned a verdict for the plaintiff, that the allegations of the complaint relating to such mistakes are true. The plaintiff then moved the Court for a decree reforming said contract, which motion was denied; whereupon the plaintiff asked leave to again amend his complaint by striking from the allegations respecting the contract, the words, "the plaintiff agreed with the agents of the defendants *to purchase* of the defendants," and inserting in place thereof the words, "the plaintiff agreed with the agents of the defendants, that the defendants *should manufacture and ship* for plaintiff;" also by striking out therefrom the words, "then and there *sold* said machine," and inserting the words, "then and there *agreed to manufacture and ship* said machine"—which motion was allowed by the Court. Thereupon the plaintiff moved "for a decree to reform the contract so as to conform the contract to the complaint as thus amended." This motion was denied and the plaintiff appeals from the order denying the same to this Court.

R. A. JONES for Appellant.

C. G. RIPLEY for Respondents.

I.—The order of the District Court should not be reversed for the reason that a decree reforming any contract can only be based upon facts proved, and must conform to the facts proved.

The motion is understood to have been that the Court reform the written contract in accordance with the verdict, and the amended complaint. This would have been impossible; the Court must go by the facts as established by the verdict. A contract conformed to the amended complaint would be a different contract from one conformed to the facts established by the verdict.

II.—The decree asked for by the plaintiff would have violated the defendants' rights. It would have violated their right to amend their answer to meet the amended complaint, and to have a new trial of the issues raised upon such amended pleadings.

By the changes in the complaint the answer becomes changed in its scope and meaning and might compromise defendants.

III.—The decree asked for by plaintiff should not have been granted, because the Court exceeded its authority, in allowing the amendments without first setting the verdict aside and ordering a new trial.

Nor do the amendments fall within the purview of the statute. They are not in furtherance of justice, for they work an injustice. They are not allegations material to the plaintiff's case, as he had proved it; but state a different case. They do not conform the pleading to the facts proved, but cause it to differ therefrom. So long as the verdict stood these amendments should not have been allowed. *Comp. Stat., chap. 60, sec. 90, p. 544; Bingham vs. Supv. Winona Co., 6 Minn., 136; Henderson vs. Shaw, 7 Minn., p. 480.*

By the Court—McMILLAN, J.—By the special finding of the jury the contract as set forth in the second amended complaint of the plaintiff is established as the contract made between the parties, and the finding of the jury is the only basis for a decree of reformation of the written contract. The amendment asked for by the plaintiff and granted by the Court, makes a contract different from that found by the jury, and although the Court erroneously granted leave to make the amendment after the verdict, it does not follow that it must continue the error by making the decree moved for. The record shows that the jury have not found the contract as set forth in the complaint as last amended, but have found a different contract. The Court therefore was right in denying the motion for a decree.

As this conclusion determines the case, it is not necessary to pass upon the other points in the case.

The order appealed from is affirmed.

JOSEPH S. TRIGG vs. JOHN LARSON.

Sec. 150, chap. 59, Comp. Stat., makes the payment of the costs and the fee for the return essential conditions to the jurisdiction of a justice of the peace to allow an appeal in a civil action.

When it appears from the return of the justice that the fee for the return has not been paid, the appeal may be dismissed.

In a civil action the party against whom a judgment is rendered in Justice's Court, is entitled to appeal without paying his own witnesses.

Plaintiff recovered judgment against the defendant, before a justice of the peace of Freeborn County. At the instance of the defendant an appeal was allowed by the justice to the District Court of said county. In the District Court a motion made by the plaintiff to dismiss such appeal, was granted. Defendant appeals to this Court.

A sufficient statement of the points presented appear in the opinion of the Court.

FRANKLIN & WAITE for Appellants.

I.—The action was dismissed under the following statute: "No appeal shall be allowed by any justice until the appellant, in addition to the above requirements, shall pay all costs which may have accrued in Justice's Court, and one dollar for his return." *Comp. Stat.*, 518, sec. 150.

The statute means only such costs as were taxed against the appellant for the benefit of the other party. Whether the appellant had paid his own witnesses, in no way affected the rights of the respondent. This is decided under a statute of New York that requires the appellant to pay the costs of suit. 7 *Cow.*, 507, *Ex parte Bendlestone*.

II.—But if the law were otherwise, it is no cause for quashing an appeal, that a party has paid the Justice less than the real amount of costs, if a party is willing to pay all, and has in fact paid all that was demanded. 4 *Wend.*, 202, *Peo. vs. Genesee Com. Pleas.*

The entry of “appeal allowed” on his docket, which is required of the justice by our statute, but not until all requirements are complied with, (see *Comp. Stat.*, 517, *sec.* 137,) shows that the appellant paid all the costs demanded by the justice, and the amount he did pay is a good show of willingness to pay on his part.

III.—As to the dollar to be paid to the justice for his return, he may waive it if he pleases, and if he enters on his docket “appeal allowed,” without the payment of this fee, he in effect does so. Should there be any doubt, however, about this, there certainly cannot be when he makes and files his return without his pay.

A justice cannot be compelled to allow an appeal nor to make a return unless his costs are fully paid, nor unless one dollar is paid for his return. But if he does make return, that fact gives the appellate Court jurisdiction, and they can even amend proceedings before the return, to make the appeal effectual. *People vs. Onondaga Com. Pleas*, 7 *Wend.*, 567; *People vs. Ranslaer Com. Pleas*, 11 *Id.*, 174.

IV.—Analogous to these principles is the decision that neither the Common Pleas nor the party have anything to do with the question as to whether the notice of appeal served on the justice is defective. 3 *Cow.*, 379, *ex parte John H. Clarke.*

The appellate Court could order the payment of more costs, if necessary or proper.

SMITH & GILMAN for Respondent.

In attempting to appeal, the requirements of the statute in that respect were not complied with so as to give the District Court jurisdiction of the case.

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Secs. 136-7, p. 517, and sec. 150, p. 518, Comp. Stat., prescribe what is necessary to take a case by appeal to the District Court from the judgment of a justice of the peace. The appeal must be taken within ten days; an affidavit must be filed; a recognizance must be entered into, and the costs before the justice must be paid. *Bundy vs. Dunbar*, 5 *Minn.*, 444.

The justice has no right to allow an appeal until they are complied with, and if he does allow it where the statute is not complied with, it will not give the District Court jurisdiction of the cause.

Said *section 150* provides that "no appeal shall be allowed by any justice of the peace until the appellant shall pay all costs which may have accrued in the Justice's Court, and one dollar for the return."

By the Court—McMILLAN, J.—This is an appeal by the defendant from an order of the District Court dismissing an appeal from a judgment rendered in Justice's Court. The grounds on which the appeal was dismissed were—

1. That the fee of one dollar for making the return was not paid to the justice.

2. The fees of defendant's witnesses, as taxed, were not paid.

It distinctly appears from the return and amended returns of the justice that his fee for making the return was not paid, and that he did not *in fact* waive or intend to waive the payment of it.

Sec. 150, chap. 59, Comp. Stat., provides that "no appeal shall be allowed by any justice of the peace until the appellant in addition to the requirements of section one hundred and twenty-three of this article [*sec. 136, chap. 59, Comp. Stat.*,] shall pay all costs which may have accrued in the Justice's Court, and one dollar for the return of the justice."

This section we think makes the payment of the costs and the fee for the return essential conditions to the jurisdiction of the justice to allow an appeal.

The facts presented in this case do not constitute payment

within the terms of the statute. The fee for the return not having been paid, the Court below properly dismissed the appeal. *Ex parte La Farge*, 6 Cow., 61; *Ex parte Stephens, Id.*, 69; *The People ex rel. Lincoln vs. Saratoga Common Pleas*, 1 Wendell, 282.

The second ground upon which the appeal was dismissed is not tenable. In a civil action the fees of witnesses for a party against whom a judgment is rendered in Justice's Court are not taxable as costs under the judgment. Such party, therefore, is entitled to appeal without paying his own witnesses. *Ex parte Beadleston*, 7 Cow., 506; 11 Wis., 393.

But as the appeal was properly dismissed on the first ground stated, the order must be affirmed.

STATE OF MINNESOTA VS. THOMAS J. SHIPPEY.

It appearing that the defendant deliberately and intentionally shot the deceased, the presumption is that it was an act of murder.

A party indicted is not entitled to an acquittal on the ground of insanity if at the time of the alleged offence he had capacity sufficient to enable him to distinguish between right and wrong, and understood the nature and consequences of his act, and had mental power sufficient to apply that knowledge to his own case.

The designed killing of another, without provocation and not in sudden combat, is none the less murder because the perpetrator of the crime is in a state of passion.

To determine on the sufficiency of the provocation to mitigate the killing from murder to manslaughter, the instrument or weapon with which the homicide was effected must be taken into consideration; if effected by a deadly weapon, the provocation must be great to lower the grade of the crime from murder.

When the revenge is disproportionate to the injury it can not be said in a legal sense to have been provoked by such injury.

State of Minnesota v. Shippey.

Self-defence is *ex vi termini* a defensive, not an offensive act, and must not exceed the bounds of mere defence and prevention. To justify such act there must be at least an apparent *necessity* to ward off by force some bodily harm.

The mere fact that the defendant *believed* it necessary for him to act in self-defence would not warrant a "verdict of acquittal."

An error of the Court concerning an abstract proposition having nothing to do with the matter in hand, is not sufficient ground for reversing a judgment.

The objection that the signature by the foreman of the grand jury on the back of the indictment was not sufficient, not having been taken by motion to set aside the indictment or by demurrer, was waived.

This is an application on the part of the defendant to the Supreme Court for a new trial, under *sec. 6, p. 777, Comp. Stat.*

The defendant was tried upon an indictment for the murder of Frederick Raymond, at the October term of the Wright County District Court, 1864, and convicted of murder in the first degree. The indictment was in the form prescribed by statute, but was not signed on the face by the foreman of the grand jury, but was indorsed as follows: "A true bill. G. D. George, foreman of the grand jury." But no objection was taken thereto. At the trial, Edward Morse, a witness produced on the part of the prosecution, testified substantially as follows:

"I reside at Minneapolis; have seen prisoner; saw him on the 8th day of March, 1864, for the first time, in the township of Rockford; Fred. Raymond, David Kridler and David Beadle were with me; Raymond was the man killed. We were going from the village of Rockford to Woodland; the road led about six rods from Shippey's house, and when some quarter of a mile from Shippey's house, Raymond said he was dry and would like some water, and as we got opposite the house I said let us go in and get some, and we went into Shippey's enclosure. Shippey was outside of his house; it was about three o'clock in the afternoon; I asked him for a drink of water; he said nothing, but turned and went as though he was going to get some, going around his house a few steps and stopping. Raymond then asked for water. He then ordered us to leave, and said we had no business

there; Raymond then said, that is a strange way to use folks; Shippey then ordered us to leave again; I spoke to Raymond and said "let us leave and have no trouble with the old man; we had no arms or other implements of defence; Raymond said "of course," and then walked off, and I followed him towards the the road; did not see anything until I was going through the fence, Kridler spoke saying "Look out, Fred., he has a gun." I looked around and saw him with a gun in his hand; saw then a stick going through the air from the direction in which Raymond was towards Shippey; Raymond had passed out before me; this stick was about eighteen inches long and three-fourths of an inch thick, and looked like a root; do not think the club was thrown with the intention of hitting him; it was not thrown with much violence; do not think it went to Shippey; do not think Shippey had advanced towards us until the stick was thrown. When I first saw Shippey he was lowering his gun from the direction of Kridler; when Fred. threw the stick he pointed his gun at Fred.; Raymond then jumped behind a tree; Shippey did not speak that I heard; Shippey then stepped sideways as if he would like to get a shot at Raymond; Raymond then stepped from behind the tree and told him if he wanted to shoot, to shoot; prisoner then took a long aim at Raymond and fired; they were about twenty feet apart; Raymond then stepped two or three feet sideways and laid down. About an hour afterwards I went up to the body and found it in the same position; the body was taken down to the warehouse in Rockford."

Other evidence was introduced corroborating the testimony of Morse, and also proving the death of Raymond, and that it was occasioned by the discharge of Shippey's gun, testified to by Morse.

Several witnesses were introduced on the part of the defendant, who testified that they had known defendant for several years; that his conduct was singular; that he lived alone; had no books or papers, or any living thing about him; that he appeared suspicious of strangers, and to be alarmed and afraid when persons went to his house; that his looks were wild, but that he was per-

fectly rational in his business transactions. One J. S. Richardson was also examined as a witness on the part of the defendant, who testified that he had studied medicine two or three years, but had not taken any regular degree; had practiced it more or less for sixteen years, living on a farm the most of the time, and cultivating it, and also practicing medicine some; that he had known defendant two and one-half years; had not been called to attend him professionally; that he examined him and talked with him sufficiently to form an opinion as to his sanity; that he thought he was afflicted with melancholy or morbid insanity; that he did not examine defendant sufficiently to see if his brain was affected; that melancholy insanity generally makes the mind quiet; that he did not know what influence the melancholy might have; that there is no maliciousness about morbid insanity.

At the close of the testimony the counsel for the defendant requested the Court to charge the jury "that if the jury believe that the prisoner, at the time of the killing, believed in the existence of a state of facts which if true would have constituted self-defence, they must find a verdict of acquittal." The Court refused to charge as requested, but charged the jury "that the facts must be such as reasonably to have caused such belief or apprehension on the part of the defendant;" to which refusal and charge the defendant duly excepted. The Court also charged the jury "that if they find from the evidence that the defendant was at the time of the act laboring under insanity, or mental aberration, or delusion, to such a degree as not to be able to determine the character of the act he was doing, as to whether it was right or wrong, the defendant should be acquitted."

A bill of exceptions was made and allowed.

WILSON & McNAIR for Appellant.

I.—That the verdict should be set aside under *Sec. 6, page 778, Comp. Stat.*, on the ground that it was not warranted by the evidence. In that it appears therefrom—

1. That the mind of defendant was in such state of partial in

sanity, as rendered him incapable of committing murder in the first degree.

2. That the circumstances of provocation were such as should have convinced the jury, that defendant either imagined he was necessarily acting in self-defence, or his blood was so heated as to take the case out of the degree of crime found in the verdict.

II.—That new trial should be granted on account of error in the charge of the Court below. In that the counsel for defendant requested the Court to charge the jury, “that if the jury believe that the prisoner at the time of the killing believed in the existence of a state of facts, which if true would have constituted self-defence, they must find a verdict of acquittal,” which the Court refused to so charge; and thus erroneously prevented the jury from considering one ground of defence. *See case of Commonwealth vs. Rogers, 7 Metcalf, 500; Russell on Crimes, page 8, note, and Roscoe on Criminal Evidence, page 593.*

III.—That the indictment in the case was not signed by the foreman of the grand jury finding it; for though the statutes provide that most defects in an indictment must be taken advantage of by demurrer, yet can it be considered an indictment at all unless signed by the foreman?

The indictment from its form would not be good at common law, and when it must rely for being good upon following a statutory form, can it vary in so important a particular and be valid?

G. E. COLE, Attorney General, for Respondent.

I.—The indictment is, so far as the signature of the foreman of the grand jury is concerned, strictly in accordance with the statute. *Sec. 60, page 754–5, Comp. Stat.*

The signature of the foreman under the words “a true bill,” without regard to the part of the indictment in which it appears, is always sufficient. *Wharton’s Am. Cr. Law, 497–8.*

II.—No objection being made upon the trial to the indictment, all such objections are waived, and cannot avail the defendant at this stage of the cause. *Sec. 108, 109, page 764, Comp. Stat.*

III.—There being evidence in support of the verdict, it requires no citation of authorities to show that this Court will not disturb it.

IV.—The evidence in this case is so entirely conclusive, and there being absolutely no evidence tending to absolve the defendant from the guilt of the crime for which he was convicted, it is difficult to discover any other object than delay in the present motion.

V.—(a.) The charge of the judge excepted to was strictly correct as given, even when tested by the doctrine of Selfridge's case—a case which has been severely criticised, was decided not upon legal but political grounds, and which sought to engraft the principles of the code of honor upon the maxims of criminal jurisprudence. *Wharton's Cr. Law*, 1026.

(b.) The charge as requested, even if abstractly correct, was utterly inapplicable to the case at bar, there being no evidence tending to show any belief of danger to life or limb in the mind of the defendant. *Derby vs. Gallop*, 5 *Minn.*, 138.

By the Court—WILSON, C. J.—The defendant applies to this Court for a new trial under *Sec. 6, page 777, of the Comp. Stat.*

The grounds of the motion are (1), that the verdict is not warranted by the evidence, (2), error in the charge of the Court, (3), that the indictment was not signed by the foreman of the grand jury. I cannot say that the evidence did not warrant the verdict.

It clearly appears that defendant deliberately and intentionally shot the deceased, and from this the presumption is that it was an act of murder. *Com. vs. York*, 9 *Met.*, 93. This presumption it was for the defendant to rebut. I think it very clear that the evidence would not have justified the jury in acquitting the defendant on the ground of insanity.

His suspicion of strangers, apparent melancholy and peculiarity of deportment generally are not proof of insanity, as that term is popularly understood. Perhaps by theorists these peculiarities may be considered evidences of insanity. It is indeed very difficult to define that invisible line that divides insanity from sanity.

but such speculation is not here necessary ; for a party indicted is not entitled to an acquittal on the ground of insanity, if at the time of the alleged offence he had capacity sufficient to enable him to distinguish between right and wrong, and understood the nature and consequences of his act and had mental power sufficient to apply that knowledge to his own case. *Commonwealth vs. Rogers*, 7 *Met.*, 500.

I think the evidence does not show insanity of any grade ; certainly it falls far short of showing such insanity as would be a proper ground of defence according to this rule.

But the defendant's counsel insist that though insanity was not proven, "that the circumstances of provocation were such as should have convinced the jury that the defendant either imagined he was necessarily acting in self-defence, or that his blood was so heated as to take the case out of the degree of crime found in the verdict." Under our statute the killing of a human being in the heat of passion upon sudden provocation, or in sudden combat intentionally, is manslaughter, not murder. It was for the jury to say whether the homicide in this case was committed under such circumstances, and by their verdict they have negatived that hypothesis ; and in this respect too, I think their verdict is justified by the evidence.

The designed killing of another without provocation and not in sudden combat, is none the less murder, because the perpetrator of the crime is in a state of passion. *People vs. Sullivan*, 3 *Selden*, 399 ; *Penn vs. Bell*, *Addis.*, 156 ; *Penn vs. Honeyman*, *Id.*, 149 ; *State vs. Johnson*, 1 *Iredell*, 354 ; *Preston vs. State*, 25 *Miss.*, 383 ; *Campbell vs. State*, 23 *Ala.*, 44. And where there are both provocation and passion, the provocation must be sufficient. *See cases last cited.*

The circumstances of provocation proven in this case were not sufficient to extenuate the guilt of the homicide, or reduce the crime to the grade of manslaughter.

The provocation given by the deceased in trespassing on defendant's land, is not such as would provoke any person not wholly regardless of human life to use a deadly weapon. Nor is it such

as the law will recognize as sufficient to reduce the killing below murder. *Commonwealth vs. Drew*, 4 *Miss.*, 396; *State vs. Beauchamp*, 6 *Blackf.*, 299; *State vs. Morgan*, 3 *Iredell*, 186; *Monroe vs. State*, 5 *Geo. R.*, 85; 1 *Arch. Crim. Prac. and Pl.*, (7th Ed.), 808, 809, 810.

Without farther provocation than this, so far as the evidence shows, the defendant took his gun and followed deceased, with the apparent purpose of shooting him or his companion. It is true that before the prisoner shot deceased, the deceased threw at him (but did not hit him with) a stick or club; but I think that this could not be considered such provocation as the law looks upon, as an alleviation of the homicide from murder to manslaughter.

There is a wanton disregard of human life and social duty in taking or endeavoring to take the life of a fellow being, in order to save oneself from a comparatively slight wrong, which the law abhors.

To determine on the sufficiency of the provocation to mitigate the killing from murder to manslaughter, the instrument or weapon with which the homicide was effected must be taken into consideration; for if it was effected with a deadly weapon, the provocation must be great indeed to lower the grade of the crime from murder; if with a weapon or other means not likely or intended to produce death, a less degree of provocation will be sufficient; in fact, "the instrument employed must bear a reasonable proportion to the provocation to reduce the offence to manslaughter."

Wharton Cr. Law, (2 Ed.), 368-9, and cases cited in notes; see also 7 *Arch. Crim. Prac. and Pl.*, (7th Ed.), 803-4, 808-9-10, 816, 821, and cases cited in the notes; *Com. vs. Mosler*, 4 *Barr*; *Regina vs. Smith*, 8 *Cur. & Payne*, 160.

The revenge in this case was disproportionate to the injury, and outrageous and barbarous in its nature, and therefore cannot in any legal sense be said to have been provoked by the acts of the deceased.

The facts in this case incontrovertibly show that the prisoner did not act and could not have supposed it necessary to act in

self-defence. He was the pursuer not the pursued. Self-defence can only be resorted to in case of necessity.

The right to defend himself would not arise until defendant had at least attempted to avoid the necessity of such defence. *People vs. Sullivan*, 3 *Seld.*, 399; *Wharton Cr. Law*, 386; *Regina vs. George Smith*, 8 *Car & Payne*, 160.

The defendant's counsel asked the Court to charge the jury, "That if the jury believe that the prisoner at the time of the killing believed in the existence of a state of facts, which if true would have constituted self-defence, they must find a verdict of acquittal," which the Court refused; but charged the jury that "the facts must be such as reasonably to have raised such belief or apprehension on part of the defendant."

The Court was correct in refusing to charge as thus requested. The mere fact that defendant *believed* it necessary for him to act in self-defence would not warrant a "*verdict of acquittal*."

It is not enough that the party believed himself in danger, unless the facts and circumstances were such that the jury can say he had reasonable grounds for his belief. *Comp. Stat.*, 703, *Sec. 5*; *Shorter vs. People*, 2 *Conn.*, 193; *Wharton's Cr. Law*, 386; *Arch. Cr. Prac. and Pl.*, 798; *U. S. vs. Zigol*, 2 *Dallas R.*, 346

In Tennessee, I believe, it has been held otherwise, (*Grainger vs. The State*, 5 *Yerger*, 459,) but I think this decision stands alone, unsupported by either principle or authority. Such belief would perhaps reduce the crime to manslaughter, but whether it would or not it is not necessary to decide in this case.

The only exception taken to the charge of the Court is above given, and we must therefore presume that in every other respect it was full and correct. But even if the charge in this respect had been erroneous, it would not be a good ground for reversal of the judgment. Self-defence *ex vi termini* is a defensive not an offensive act, and must not exceed the bounds of mere defence and prevention.

To justify such act there must be at least an apparent *necessity* to ward off by force some bodily harm.

Where the party has not retreated from or attempted to shun the combat, but has as in this case unnecessarily entered into it, his act is not one of self-defence.

The plaintiff by taking his gun and following after the deceased without any previous provocation, (such as the law will recognize as provocation for the use of a deadly weapon,) showed conclusively that the homicide was not committed in self-defence, real or imaginary. The evidence, therefore, did not make a case for laying down the law of self-defence, and an error of the Court concerning an abstract proposition having nothing to do with the matter in hand, is not sufficient ground for reversing a judgment. *Shorter vs. People*, 2 Conn., 202.

The other ground on which defendant's counsel ask a new trial, is that the indictment was not signed by the foreman of the grand jury.

Whether the signature by the foreman on the back of the indictment was sufficient it is not necessary for us now to decide.

This objection, not having been taken by motion to set aside the indictment or by demurrer, was waived. *Sec. 2, page 764, and Sec. 11, page 766, Comp. Stat.* I have felt in the examination of this case a great anxiety to discover some legal ground on which to grant the defendant a new trial, but governed as the Court is and ought to be strictly by the rules of law, I have failed to see any ground for such action. It is for us to declare the law, and if this is a case in which it should not be rigorously enforced, the State executive only can apply the remedy.

New trial denied.

LYMAN DAYTON and MARIA B. DAYTON, his wife, vs. JOHN E.
WARREN.

In 1858 the defendant conveyed to the plaintiff, Maria B. Dayton, by deed, with covenants of seizin and warranty, the southwest quarter of section 21, town 29, range 23. The deed (in which the consideration was stated to be \$8000) contained the following recital or stipulation: "It being expressly understood between the parties hereto that the consideration expressed above, to-wit, \$8000, is the estimated value of certain lots in Lyman Dayton's addition to St. Paul, in exchange for which lots the above described premises are hereby conveyed as aforesaid." *Held*—that this is a mere recital of the consideration, and therefore susceptible of explanation; that the question to be tried in the case is what the value was as a matter of fact, and what the defendant thus admitted in the deed may be evidence, but it is not conclusive of the fact.

In the Court below, there being a deficiency of jurors, the Court summoned by a special venire a number of persons to serve as jurors for the term. Subsequently when this cause was called, a challenge was interposed by defendant's counsel to the regular panel, and said challenge was allowed. The Court then—the defendant objecting thereto, ordered the Clerk to draw a jury for the trial of the cause from the jurors summoned on the special venire. *Held*—not to be error.

The complaint in this action alleges the conveyance of certain real estate to the plaintiff, Maria B. Dayton, by the defendant John E. Warren and wife, by deed dated July 15, 1858, with covenants of seizin and warranty of title, for the consideration of \$8000; that said sum of \$8000 was the price and value of certain real estate owned by said Maria B., which was on the same day conveyed by the plaintiffs to the defendant. The deed of Warren and wife to Maria B., contained the following recital or stipulation, to-wit: "It being expressly understood between the parties hereto that the consideration expressed above, to-wit, \$8000, is the estimated value of certain lots in Lyman Dayton's addition to

St. Paul, in exchange for which lots the above described premises (the land described in the deed from Warren and wife to Maria B.) are hereby conveyed as aforesaid." The complaint alleges the breach of the covenants of seizin and warranty, and that the title and possession has been decreed by the Court to be in one Fisk, and demands judgment for \$8000 and interest, &c.

The answer alleges in substance an exchange of real estate by the parties, and that the consideration mentioned in the deed from Warren and wife to Maria B. was merely nominal; and that the value of the real estate conveyed by Dayton and wife to Warren did not exceed \$800. The answer denies that the recital or stipulation mentioned was inserted in the deed to evidence the amount or agreed value or consideration of the property referred to therein.

The cause was brought to trial at the October term, 1864, of the District Court in Ramsey County; the defendant demanded a jury and paid the legal fees, and the Court ordered a jury to be called and empaneled. Before any juror was sworn the defendant challenged the panel (in writing) upon the following grounds, viz:

1. Because the list from which the regular jurors for the term had been selected was not certified by the chairman of the board of county commissioners.
2. Because said list was not signed by the clerk of the board, or the county auditor.

The plaintiffs denied the challenge, and the Court proceeded to try the question of fact, and found the challenge to be true and allowed the same and discharged said jurors. The Court directed the clerk to remove from the jury ballot box the ballots containing the names of all jurors in the regular panel, and to draw a jury from the remaining ballots which had thereon the names of jurors who had been summoned to serve during the term upon two special venires issued to supply a deficiency in the number of regular jurors, before any challenge to the panel in any case had been made or allowed, and such jury was drawn and sworn, against the objection of defendant, who claimed that a special venire should issue to summon jurors to try said cause.

Dayton et al. v. Warren.

The plaintiffs offered in evidence, without objection, the deed from the defendant and wife to the plaintiff, Maria B., which contained the recital or stipulation above specified as to the value of the real estate received by the defendant from the plaintiffs, and rested.

The defendant then offered to show—

1. That the said recital or stipulation was not inserted in the deed for the purpose of fixing the value of the land exchanged.

2. That the true value of the land in question conveyed by the plaintiffs was less than \$800 at the time of the delivery of said deed.

3. That the recital or stipulation was inserted in said deed at the instigation of Lyman Dayton, as agent of Maria B., for the purpose of defrauding the defendant.

The offers were separately made, and overruled by the Court, and such ruling excepted to by defendant. The cause was submitted to the jury without further evidence, and a verdict was rendered in favor of the plaintiffs against defendant for the sum of \$11,635.34. Judgment was perfected on said verdict, and defendant sues out writ of error.

I. V. D. HEARD for Plaintiff in Error.

I.—The Court erred in allowing persons who had been called into Court to supply a deficiency of jurors, to act as jurors after it appeared that there was not simply a deficiency but an entire absence of jurors. *Chap. 21, p. 76, Sess. Laws 1862.*

II.—The Court erred in excluding testimony as to the actual value of the property exchanged by Dayton and wife with the plaintiff in error.

The Court held in effect that there was a contract fixing the damages in case of an infraction of any of the covenants of the deed of Warren and wife, and that such a contract was conclusive. Both positions it is claimed were wrong.

- a. There is no contract, express or implied, in the deed of Warren, to pay any sum whatever, much less to pay any sum as dam-

ages for an infraction of the covenants, for the stipulation in the deed does not even refer to the covenants.

b. If a contract, it was not conclusive, but might be inquired into.

The courts never adopt as standards for assessing damages the contracts of the parties, in cases where the damages are established by law or are ascertainable by proof, (as in the present case), unless the damages so fixed are within the rate established by law, or do not exceed the actual loss. To hold otherwise would be to allow the parties to override the law or usurp the functions of the Court. *Mason et al. vs. Callender et al.*, 2 Minn., 350; *Marston vs. Talcott*, 3 Id., 339; *Daniels vs. Ward*, 4 Id., 168; 3 *Johnson's Cases*, 297; *Sedgwick on Damages*, chap. 16.

More especially is this the case where the contract is grossly inequitable and unconscionable, as in this case, giving \$10 for \$1. 5 *Cow.*, 144; *Sedgwick on Damages*, (Ed. of 1858), pp. 221, 222, 223.

SMITH & GILMAN for Defendants in Error.

The parties having fixed and agreed upon the value of the property which was the consideration for the deed, upon the covenants of which the action is founded, and that valuation being specially incorporated in the deed, is conclusive between the parties. When property, instead of money, is the consideration for a conveyance, and the parties at the time fix and agree upon the value of such property, and so express it in the deed, it is conclusive between them in an action on the covenants, so as to determine the amount of damage to be recovered.

In *Hanson vs. Buckner*, 4 *Dana*, (Ky.), 251, "Where natural affection was in fact the inducement, but a money consideration was stated in the deed, it was held that the latter should be taken as the grantor's valuation, and determine the sum to be recovered" in an action like the present.

In the case at bar, the deed does a great deal more than express a money consideration. It, in terms, expresses that such was the

value of the property as then agreed between the parties. We think, therefore, there was no error in the rulings of the Court below.

By the Court—WILSON, C. J.—In 1858, the defendant conveyed to the plaintiff, Maria B. Dayton, by deed with covenants of seizin and warranty the south-west quarter of section 21, town 29, range 23. The deed (in which the consideration was stated to be \$8,000,) contained the following recital or stipulation: "It being expressly understood between the parties hereto that the consideration expressed above, to-wit: eight thousand dollars, is the estimated value of certain lots in Lyman Dayton's addition to St. Paul, in exchange for which lots the above described premises are hereby conveyed as aforesaid. The deed for the conveyance of said lots in Lyman Dayton's addition to St. Paul from said Maria B. Dayton to John E. Warren bearing even date herewith."

The title to the land conveyed by defendant having failed, this action is brought to recover the damages which the plaintiffs have sustained on that account.

The principal question arising in this case is whether the measure of damages is varied by the aforesaid stipulation or recital.

It is not necessary for us here to inquire whether it is competent for the parties by an express stipulation in the deed, to fix the measure of damages for a breach of any of the covenants, as we see no evidence in the language here used of any intention to fix or vary the liability of either party in the event of a breach of the covenants.

The language above quoted seems to have been inserted from abundant caution for the purpose of clearly showing the facts of the case, and excluding the conclusion that would otherwise necessarily have followed from the language used—that the consideration was money. It is a mere recital of the consideration, and is therefore susceptible of explanation.

What the parties *estimated* the value of the property to be is wholly immaterial, so long as they have not covenanted to abide by that estimate.

Koenig v. County of Winona.

What the value was as a matter of fact is the question to be tried in this case, and what defendant admitted in the deed or said may be evidence, but it is not conclusive of the fact.

The exception taken by defendant's counsel to the jurors summoned on the special venire, can not be sustained. The ruling of the Court in that respect was correct.

Judgment of Court below reversed and cause remanded for new trial.

MICHAEL KÖENIG vs. THE COUNTY OF WINONA.

An appeal does not lie from the assessment of damages by the board of county commissioners, made in pursuance of the provisions of *Chap. 68, Sess. Laws 1862*, providing for the location, change and vacation of highways.

Proceedings were had before the board of county commissioners of Winona county, for the laying out of a county road. Koenig presented a remonstrance against laying out the road, claiming that he would be damaged thereby \$857.50. The county commissioners laid out the road and assessed Koenig's damages at \$100; from their decision Koenig appealed to the District Court of Winona County. The appeal came on to be heard at the March term of said Court, 1864; when the cause was reached upon the calendar, the county attorney moved the Court to dismiss the appeal, upon the ground that the determination of the board of county commissioners is final and no appeal lies; which motion was granted, and from the order dismissing the appeal Koenig appeals to this Court.

SARGEANT, FRANKLIN & KEYES for Appellant.

I.—The Court erred in dismissing the appeal.

Sec. 6, Chap. 68, Laws of 1862, requires persons over whose lands a highway is located by the board of county commissioners, to present to said board his claim for damages in consequence thereof. By *sec. 17, chap. 29, Laws 1862*, it is provided: "When the claim of any person against a county shall be disallowed, in whole or in part, by the board of county commissioners, such person may appeal from the decision of such board to the District Court in the same county, by causing a written notice of such appeal to be filed in the office of the county auditor, within thirty days after the decision appealed from was made." Chapter 29 of the laws of 1862, is amendatory of sections 17 and 18 of chapter 7 of the Compiled Statutes.

By *sec. 13 of said chap. 7*, the several boards of county commissioners are authorized and required to lay out, discontinue or alter county roads and highways within their respective counties, and to do all other necessary acts relating thereto.

By *secs. 17 and 18 of chap. 7 of the Comp. Stat.*, an appeal was allowed from the disallowance by the board of county commissioners of any claim or part of claim.

The statute in relation to the manner of laying out and altering county roads in force at that time (*chap. 11, Comp. Stat.*) makes no mention in terms of an appeal from their decision, and yet it is submitted, that it was a party's right to lay before them a demand for damages, which demand constituted in contemplation of the statute, such a claim as would enable the party to appeal to the District Court, in case of such claim's being disallowed in whole or in part, and that the appellant had equally a right to appeal to said Court in the case at bar.

WM. MITCHELL for Respondent.

The sole question to be decided is whether a party has a right of appeal to the District Court from an assessment of damages by laying out a road, made by the county commissioners pursuant to *chap. 68, Gen. Laws of 1862*.

On behalf of respondent it is submitted that the right of appeal

to the District Court given by *sec. 17, chap. 7, Comp. Stat.*, does not apply to an assessment of damages made by county commissioners under *chap. 29, Laws 1862*.

I.—There can be no such right of appeal by implication, because in no case whatever is an appeal to the District Court allowed from any assessment of damages caused by laying out a road. Where the road is laid out by the authorities of a township, a party may by express provision of statute appeal to three county commissioners, but in no such case is there any appeal to the District Court, and there is nothing in the act of 1862 indicating that the Legislature intended to make any especial exception in favor of cases under that act.

II.—This is not “a claim” against the county in the sense in which that word is used in *sec. 7, chap. 17, Comp. Stat.* It is not “a claim” against the county until it is assessed by the county board, and then it is “a claim” only to the amount so assessed. In assessing damages for the laying out of a road the county commissioners do not act in the same capacity as in auditing “claims” against the county. They act in the latter case as a board of auditors, and the statute in referring to their acts in this capacity speaks of their “allowing” or “disallowing” claims. But in the road law of 1862 the term used is “assessing damages.” And in doing this they act as a court or jury, and their decision therein stands on the same footing as the finding of a court or the verdict of a jury.

III.—If an appeal from their “assessment of damages” was allowed, it would defeat the operation of the law itself. In deciding upon the propriety of laying out a road, they are required to take into account the comparative damages and public benefits. If the damages exceed the public benefit to be derived from laying out the road, they shall order the petition dismissed. This clearly indicates that their assessment is to be final. Were it otherwise, they might grant the prayer of the petition, supposing the advantage to the county from laying out the road would warrant the county in paying the amount assessed by them, and afterwards on appeal judgment might be obtained against the county.

for an amount far exceeding any advantages to be derived from the new road.

By the Court—McMILLAN, J.—The act under which the proceedings to lay out the road in this case originated, does not by its terms allow an appeal from the assessment of damages by the commissioners, or from their decision locating the road. If, therefore, the right of appeal exists, it must be given by some other statutory provision. The only provision upon which the appellant relies to sustain the appeal is *sec. 17, chap. 7, of the Comp. Stat., amended 1862, Sess. Laws 1862, p. 84.*

While the statute under which the proceedings in this case were had, permits a party to present to the board of commissioners a claim for damages, it will be observed that no claim *legally* exists against the county until the final determination of the board to locate the road. *Sess. Laws 1862, chap. 68, sec. 6.* For if after the assessment of damages the board should determine that the road was not of sufficient advantage to the county to warrant the paying of the damages assessed, and dismiss the petition, no injury would result to the claimant and no liability exist on the part of the county. The assessment of damages itself does not create a claim against the county; it is the location of the road only that gives validity to any claim for damages. We think it is not such a claim as is embraced in the section allowing an appeal. But it was evidently the intention of the law that no appeal should be allowed from the assessment of damages by the board of commissioners. By the terms of the act the commissioners are to determine whether the damages are greater than the public utility of the road. It will be perceived that the judgment of the commissioners in locating a road is based expressly upon the amount of damages as assessed by them. Any alteration, therefore, of the amount of damages would seriously affect their judgment in laying out the road, and might entirely change their determination. Yet if an appeal may be allowed from the assessment, the damages may be increased indefinitely and still the determination to locate the road remain unchanged, for it is not

supposed that the appeal lies from or affects the determination of the board locating the road. A construction of the law which would lead to such results would not be reasonable.

We think the appeal was properly dismissed. The order is affirmed.

***JAMES S. REYNOLDS VS. STEAMBOAT FAVORITE.**

Action of plaintiff against defendant under *Chap. 76 of the Comp. Stat.*; *Held*—that the remedy given by this chapter is a "common law remedy," and is therefore saved to suitors by the judiciary act of the United States, passed in 1789. That the District Courts of this State have jurisdiction in this class of cases.

The complaint alleges in substance that the defendant is a steamboat, and used and employed by the masters, owners, &c., thereof, in carrying and transporting passengers and freight for hire as a regular business and public employment on the Mississippi River from St. Paul, Minnesota, to La Crosse, Wisconsin, &c., and has been so used and employed for more than three years last past, and is now lying at the port of St. Paul in said county, &c.; that one David R. Reynolds on the 23d day of October, 1862, entered into a contract in writing with said defendant, in and by which the defendant agreed to transport a quantity of wheat and sacks for said Reynolds, from said St. Paul, and to deliver the same to the agent of said Reynolds at La Crosse, Wisconsin, without delay, (the unavoidable dangers of navigation and fire only excepted,) to be by such agent forwarded to Milwaukee, at and for a specified price agreed to be paid therefor; that on said 23d day

*This cause was heard and submitted before Mr. Justice Berry took his seat on the Bench.

Reynolds v. Steamboat Favorite.

of October, 1862, the said defendant received and took the wheat to be transported and delivered as in said contract specified; that the defendant has failed to perform said contract, and that owing to the negligence, unskillfulness and remissness of the master and officers and others having said defendant in charge, the wheat and sacks were wholly lost and were sunk and destroyed in the waters of the said river, at or near Lake Pepin in this State, and that such loss was not occasioned by fire or by the unavoidable dangers of navigation of the said river, but solely by the negligence and omissions of the master and officers of the defendant; that after the cause of action accrued, the same was duly assigned and transferred to plaintiff. The complaint contains an allegation of the amount of damages sustained, and demands judgment, &c. A demurrer to the complaint was interposed, specifying the following grounds, viz:

"First, That this Court has no jurisdiction in the premises for that—1st, the case stated by said complaint is one wholly of maritime jurisdiction, and the cognizance thereof as against said defendant belongs exclusively to the proper Court of the United States, to-wit: in this State to the District Court of the United States for the District of Minnesota in the first instance; and 2d, that this action is not authorized by any statute or law of this State; and 3d, that by the constitution of this State this Court has original jurisdiction in civil cases only in law and equity, and that this is not such a case.

"Second, That the plaintiff has no legal capacity to maintain this action, for that it is stated by said complaint that he is the assignee of the cause of action therein set forth.

"Third, That it appears by said complaint that the said plaintiff is not the proper party plaintiff, for that it is therein stated that the cause of action therein set forth was assigned to said plaintiff by one D. R. Reynolds after the same had accrued.

"Fourth, That the said complaint does not state facts sufficient to constitute a cause of action."

The demurrer was overruled by the Court below, and the defendant appeals to this Court.

LORENZO ALLIS, for Appellant.

I.—This Court has no jurisdiction in the premises.

1. The case stated by plaintiff being wholly of admiralty and maritime jurisdiction, the cognizance thereof as against the defendant belongs exclusively to the Courts of the United States, to-wit: within the State of Minnesota to the District Court of the United States for said District. *Constitution of U. S., Art. 3, Sec. 2; Judiciary Act of 1789, Sec. 9; Ashbrook et al. vs. Steamer Golden Gate, Newberry's Admiralty Rep., Vol. 1, page 296. and authorities there cited.*

2. This action is not authorized by *Chap. 76, Comp. Stat.*, which is confined to vessels "used in navigating the waters of this State," whereas in the case at bar the vessel was used in navigation between this and other States, and the contract sued upon was for carriage between a port in this State and a port in another State.

3. Under the constitution of this State the District Courts have original jurisdiction in all civil cases, both in law and equity. *Art. 6, Sec. 5 of Constitution of Minnesota.* But they have no admiralty jurisdiction.

The distinction between remedies at law and in equity and those in admiralty, are well defined and understood. *Ashbrook et al. vs. Steamer Golden Gate, above cited.*

II.—The cause of action set up in this case is not assignable.

1. Liens given to secure debts are personal privileges, and are not assignable.

2. The action authorized by *Chap. 76. Comp. Stat.*, cannot be assigned.

GEORGE L. OTIS for Respondent.

I.—Our statute authorizing proceedings against boats, (*Pub. Stat., page 647.*) is not in conflict with the constitution or any law of the United States.

The constitution provides that the judicial power of the United States shall extend to all cases of admiralty jurisdiction. *Art. 3, Sec. 2, Constitution U. S.*

1. It is possible, and may be conceded for the argument, that under this constitutional provision it is competent for Congress to make that jurisdiction exclusive, and that by the act known as the Judiciary Act of 1789, this jurisdiction was made exclusive in the District Courts of the United States. 1 *Stat. at Large*, page 77, *Conk. Treat.*, 236.

2. The act of 1845, however, expressly makes this jurisdiction concurrent; this act expressly saving to parties the right of a concurrent remedy at the common law, where it is competent to give it, and any concurrent remedy which may be given by the State laws, when the vessel is used in the business of commerce and navigation. 5 *Stat. at Large*, p. 726, *sec.* 20.

3. After the act of 1845, and under it, arose the case of the propeller *Genesee Chief*, and in the argument it was urged that this act attempted to extend the admiralty and maritime jurisdiction beyond the limits of the constitution, but the Court held that the constitution itself extended this jurisdiction to the lakes and internal waters connecting them. *Propeller Genesee Chief*, 12 *How.*, 443.

Under this decision the only effect of the act of 1845 was to restrict instead of enlarging the admiralty jurisdiction of the United States Courts, this act expressly saving to the States their own concurrent remedies.

No principle of law is better settled than that where the constitution of the United States does not vest in the United States exclusive jurisdiction, and no act of Congress gives the exclusive jurisdiction, the States have concurrent jurisdiction in all judicial matters. 4 *Kent*, 400.

But this principle, important as it is in connection with many subjects of State legislation, is not necessary for our own purpose, for the act of Congress of 1845 not only fails to vest this exclusive jurisdiction in the United States Courts, but expressly gives the concurrent jurisdiction to the States in all cases arising on the lakes and the waters connecting them.

It has been judicially decided, that the act of 1845, as well as the jurisdiction newly asserted by the case of the propeller *Gen-*
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ese Chief, extends to the navigable rivers as well as to the lakes. *Conk. Treat.*, 279.

The case at bar is not one wholly of admiralty and maritime jurisdiction, but is one in which courts of common law have always exercised concurrent jurisdiction, and the exclusive jurisdiction granted by the judiciary act did not exclude this concurrent remedy at common law. *Percival vs. Hickey*, 18 *John.*, 257; 1 *Kent*, 377, and note A.

It is well known that nearly every State in the Union has statutes on this subject identical with our own, and their Courts are constantly exercising an unquestioned jurisdiction under them.

III.—If our first point is established, and this statute is not in conflict with the constitution or laws of the United States, then the case at bar must be determined without any reference to such constitution or laws, and is not affected at all by the admiralty and maritime jurisdiction of the United States Courts, and we have but to show, secondly, that this statute is not in conflict with the constitution of the State.

1. It will be conceded that a sovereign State may prescribe the forms of proceedings in its own Courts, and its own remedies.

But it is contended that this particular proceeding and remedy is inhibited by the State constitution. This inhibition, if it exists at all, must relate to the subject matter of the statute, or to the want of power in the forum in which is vested the jurisdiction under it.

As to the first point, we can see no constitutional inhibition against this form of proceeding. The constitution does not undertake to regulate in any manner the mode of proceeding or forms of remedies. These are left to the discretion of legislatures and the regulations of law.

As to the latter point, it is claimed by the appellant that under *sec. 5, art. 6 of the Constitution*, which provides that "the District Court shall have original jurisdiction in all civil cases, both in law and equity, where the amount in controversy exceeds \$100," the State District Court is deprived of jurisdiction under this act. It seems to us it were useless to attempt to prove what is so self-

evident as that this proceeding is a civil case as contra-distinguished from criminal, (for the term civil is evidently used in this sense in this connection), and that an unlimited jurisdiction in such civil cases is intended. Nor are the words "both in law and equity" intended in any restrictive sense, so as to deprive the District Court of jurisdiction in any civil case which was not one "in law or equity," if such a case could be conceived. But no such case can exist, for the term law in this connection is not used in any technical sense, and will cover the case of any civil inquiry of whatever kind or character not cognizant exclusively in equity. In case the constitution had provided for admiralty courts, with the jurisdiction usual to such courts, and such courts were organized, it might then be necessary to show that this case was one in which the common law courts had concurrent jurisdiction with such courts, as it clearly is, but there being no such jurisdiction known to the State laws, the question becomes unimportant in this connection.

2. It would be idle to argue a proposition so evident as that the District Court in entertaining jurisdiction under this statute is not acting as a court of admiralty and maritime jurisdiction. Such courts proceed in their peculiar and summary manner, and the trial is without jury. This proceeding is really a proceeding by attachment, entirely analogous to the general statute on the subject, differing merely in allowing the writ for different reasons, substituting the name of the boat for that of her owners, and allowing the process to be served on the officers of the boat instead of the owners.

III.—The transfer of the claim before the suit, in no way affects the remedy. The statute provides that "any person having a demand as aforesaid may institute the suit." *Pub. Stat.* 647, section 2.

In case the terms of the statute did not expressly warrant the assignee to sue, the rule would be the same, for the case of a vendor's or other lien personal to the party to whom the claim originates is not analogous to this, for under these statutes, like those providing for general attachments, the lien does not exist till the

attachment is levied. *Robinson vs. Steamboat Red Jacket*, 1 *Mich.*, (*Manning*) 171; *Moses vs. Steamboat Missouri*, *Id.*, 507.

As no lien attaches till the suit is brought, and the real party in interest must bring the suit, of course he must have the benefit of the lien.

By the Court—WILSON, C. J.—It is now settled that the admiralty jurisdiction of the United States Courts extends to all rivers or waters navigable *in fact* from the sea by vessels of ten or more tons burden. *Genesee Chief vs. Fitzhugh*, 12 *How. U. S. Rep.*, 443; *Fritz vs. Bull*, *Id.*, 466.

Sec. 2, of Art. 3, of the Constitution of the United States, provides that the judicial power of the United States extends to all cases of admiralty or maritime jurisdiction. In pursuance of this provision Congress might vest in the United States Courts exclusive jurisdiction of this class of cases, but a grant of jurisdiction generally to the United States Courts is not sufficient to vest an *exclusive* jurisdiction, and until Congress makes this jurisdiction exclusive the State Courts retain a concurrent cognizance in all cases where previous to the constitution they had jurisdiction over the subject matter. 1 *Kent's Com.*, 367; *Id.*, 377, 400; *Story on Con.*, 553; *Martin vs. Hunter*, 1 *Wheaton*, 304; *N. J. Steam Nav. Co. vs. Merchant's Bank*, 6 *How. U. S. Rep.*, 344, 390.

The judiciary act passed in 1789, provides that the District Court (of the United States) "shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost navigation or trade of the United States where the seizures are made, on water navigable from the seas by vessels of ten or more tons burden * * *saving* to suitors in all cases the right of a common law remedy when the common law is competent to give it."

This saving clause was probably inserted from abundant caution, lest the exclusive terms in which the power is conferred on the United States District Courts might be deemed to have taken away the concurrent remedy which before existed. This leaves the concurrent power in this class of cases where it stood at com-

mon law. 1 *Kent's Com.*, 377; *Story on the Con.*, 533, note; 1 *Kent's Com.*, 367, note; *N. J. Steam Nav. Co. vs. Merchant's Bank*, 6 *How. U. S. Rep.*, 390; *Percival vs. Hickey*, 18 *Johns. Rep.*, 257.

But it is urged by the appellant's counsel that the act only saves to the party "*a common law remedy*," and that this is not a common law remedy, or remedy that a court of common law is competent to give. We think this view of the case cannot be sustained.

In cases at common law the trial is by jury. In cases of admiralty and maritime jurisdiction the trial is by the Court. *The Sarah*, 8 *Wheaton*, 394. The same Congress that passed the act of 1789, above referred to, provided that in cases of admiralty and maritime jurisdiction the form and mode of proceeding shall be according to the course of the civil law.

The proceedings in this case are in all essential particulars according to the course of the common law, as contra-distinguished from proceedings in courts of admiralty. The trial is by jury, which is the distinguishing feature of the common law system. The attaching of property is not a proceeding peculiar to either Court.

It is quite competent and not uncommon for a legislature to provide that a defendant may be sued by a fictitious name, and whether that name is John Doe or Steamboat Favorite is wholly immaterial. The object is to obtain a judgment for the sum due, and to hold the boat as security for the satisfaction of such judgment.

But it is insisted that this is a proceeding *in rem*, and therefore a common law court is not competent to give such remedy. If it is admitted that the proceeding is *in rem*, this conclusion does not necessarily follow.

In England in the Court of Exchequer, and in the United States in the District Courts, in seizures made on land for violation of the revenue laws, the proceedings are *in rem*, according to the course of the common law.

Though a proceeding is *in rem*, it is not necessarily a proceed-

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ing or cause in admiralty. *The Sarah*, 8 *Wheaton*, 391; *U. S. vs. 422 Casks of Wine*, 1 *Peter*, 547; 1 *Kent's Com.*, 374-5-6.

Any person, whether original creditor or assignee of the claim, having a demand against the boat, is authorized by our statute to proceed against it in this manner.

Judgment below affirmed.

HENRY MORIN VS. STEAMBOAT F. SIGEL.

Action by plaintiff against defendant under *chap. 76 of the Comp. Stat.* *Held*—that the remedy given by this chapter is a “common law remedy,” and is therefore saved to suitors by the judiciary act of the United States passed in 1789.

That the District Courts of this State have jurisdiction in this class of cases.

This action was brought in the Ramsey County District Court to recover damages for a breach of a contract of affreightment similar to the one set out in the complaint in the preceding action. The case went to trial and a verdict was rendered in favor of the plaintiff, upon which judgment was entered. The defendant appeals to this Court.

VAN ETTE & OFFICER for Appellant.

LORENZO ALLIS, for Respondent.

By the Court—WILSON, C. J.—The questions involved in this case are all passed upon in case of *Reynolds vs. Favorite*, page *ante*, 242.

Judgment below affirmed.

THATCHER BLAKE vs. JOHN MCKUSICK.

The defendant having mortgaged to the plaintiff certain land, the plaintiff foreclosed the mortgage. The plaintiff afterward, supposing the mortgage sale to be void or irregular, commenced an action to have it set aside and a resale ordered. The defendant appeared in the action and prayed that the sale might not be set aside, and offered to quit-claim to plaintiff his interest in the premises. On his filing said quit-claim deed, the Court refused to set aside the deed. *Held*—that said sale having been confirmed at the instance of defendant, he can not now be heard to deny its validity, and that the plaintiff may maintain an action for the balance due on the notes secured by said mortgage.

This was an action brought by Blake against McKusick to recover a balance due on a promissory note. Issue was joined in the action, and the same was tried at the District Court in Washington County at the November Term, 1863, by the Court, without a jury. The following are the facts as found by the Court: That McKusick made, executed and delivered to Blake the promissory note mentioned in the complaint, which was secured by a mortgage containing the usual power of sale, duly executed by said McKusick and wife to Blake, on certain real estate in Washington County. Default having been made in the conditions of the mortgage, the plaintiff proceeded to foreclose the same by advertisement pursuant to statute. The mortgaged premises were sold on the 20th November, 1860, and bid off by the plaintiff, and the affidavits of publication of notice and of the sale, were filed for record in the proper county on the 21st November, 1860, and the proceeds of said sale were endorsed on said note, leaving a balance due thereon. There was a defect in the proceeding for foreclosure, of which the parties were ignorant, and the plaintiff entered into possession of the premises, with the consent of the defendant

on the 26th January, 1861, and such entry was made under said foreclosure and sale. In November, 1862, the plaintiff (Blake) commenced an action against defendant, McKusick and wife, setting forth in his complaint, in substance, the defect in the foreclosure, and asking that the sale be set aside, and for a decree of foreclosure of the mortgage. The defendants in answer to such complaint, alleged that they had tendered, and in said tender offered to plaintiff a full and absolute release of all their right and equity of redemption in the premises, and asking that the relief demanded in the complaint be denied. It was ordered and decreed in such action, that upon depositing with the Clerk of the Court a release and quit claim, executed by the defendants, of all their right, title and interest in the premises to the plaintiff, the relief demanded in such action should be denied. The defendants executed, acknowledged and deposited such quit claim deed pursuant to the decree of the Court, prior to the commencement of this action. That no payment or satisfaction of said note, other than that arising from said sale, has been made; that the balance thereon on the 20th November, 1860, after deducting the proceeds of said sale, is \$1,246.65, which with interest to date (finding of Court) amounts to the sum of \$1,515.70.

The following are the conclusions of law on the foregoing facts as stated by the Court: "I find that the defendant before the commencement of this action, ratified and approved said sale and foreclosure, and released to the plaintiff all his right, claim and interest in and to said premises, and that the said foreclosure of said mortgage, and sale of said premises is valid and binding upon the parties to this action; that the amount of the proceeds of such sale, less the costs of such sale, is to be applied as a payment *pro tanto* of the said promissory note.

"That the plaintiff is entitled to judgment in his favor against the defendant for the said sum of \$1,515.70, together with his costs in this action."

Judgment was entered for the plaintiff, and the defendants appeal to this Court.

H. R. MURDOCK and WM. M. McCLEUR for Appellant.

I.—The facts show that the mortgagee holds the premises under the mortgage and in satisfaction of the debt.

II.—The District Court erred in finding any balance due on the note; there having been no legal sale or foreclosure, it cannot be said that any amount has been applied upon the note except the whole amount due, and the mortgagor can not be taxed with the costs or expenses of the attempted foreclosure by advertisement, nor is he in any manner bound by the amount bid on such attempted foreclosure.

III.—The mortgagee having taken possession of the mortgaged premises, could have applied to the Court to have them valued, and the ascertained value applied on the note; but not having taken that course, it is to be presumed that he holds the premises in satisfaction of the debt.

IV.—There is nothing in our statute preventing a common law foreclosure of a mortgage. The legal title passes to the mortgagee upon default, notwithstanding the provisions of *Sec. 11, page 596, of the Comp. Stat.*, as has been expressly held by this Court in the case of *Pace vs. Chadderdon*, 4 *Minn.*, 499. The statute foreclosure is only the means provided for the mortgagee to possess himself of the rights acquired under his mortgage. But where the mortgagor has surrendered the possession by his voluntary act, and the mortgagee takes the possession without asking to have the premises valued, no other foreclosure is necessary; he holds the property for the debt. The mortgagor may redeem by paying the whole debt, and not otherwise; but in this case, the right of redemption having been released, the mortgagee has a full title to the premises and the debt is discharged.

V.—The District Court erred in holding that the release executed by defendant operated as a ratification of the sale. The release was as stated in the finding of the Court, a quit claim deed in the usual form. It did not purport to ratify the sale, nor was such the intention nor legal effect of it. The mortgagee was in possession under his mortgage, and the mortgagor by his release

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surrendered the equity of redemption without any reference to the attempted sale. The following authorities are referred to: *Hunt vs. Stiles*, 10 *N. H.*, 466; *Erskue vs. Townsend*, 2 *Mass.*, 483; *Newhall vs. Wright*, 3 *Mass.*, 138; *Pomeroy vs. Winship*, 12 *Mass.*, 514; *Scott vs. McFarland*, 13 *do.*, 507; *Lowell vs. Shaw*, 5 *Shepley*, 423; *St. John vs. Bumpstead*, 17 *Barb.* 100; *Hilliard on Real Property*, Vol. 1, 486; 4 *Kent's Com.*, 182-3; *Schell vs. Schroder*, 1 *Bailey's Equity Rep.*, 334.

L. E. THOMPSON for Respondent.

I.—The act of taking possession of mortgaged premises by a mortgagee after default with or without consent of the mortgagor, does not constitute a foreclosure of the equity of redemption, nor a satisfaction of the mortgage debt. *Comp. Stat. Minn.*, 596, Sec. 11; *Adams vs. Corrison*, 7th *Minn. Rep.*, 456; 1 *Hilliard on Mortgages*, 103. The most that can be claimed as against a mortgagee in possession, unexplained in this State, is that he might be held liable to account to the mortgagor for the rents and profits of the estate. *Vide authorities above cited.*

II.—The plaintiff by entering into the mortgaged premises under his foreclosure, (affirmed by appellant,) created no liability to the mortgagor. After sale the mortgagor had no rights in and to said premises, except possession for one year and the right of redemption, which rights by his deed duly executed and delivered before the commencement of this action the appellant has released.

III.—The Court below in view of the facts found, committed no error in finding the plaintiff entitled to a judgment for the balance due upon said note. *See Blake vs. McKusick*, 8 *Minn.* 338.

By the Court—WILSON, C. J.—The Appellant can not be heard in this case to deny the validity of the mortgage sale.

That sale was confirmed by the Court, not only by his consent, but at his instance. *See Blake vs. McKusick*, 8 *Minn. Rep.*, 338.

The evidence and the facts fully justify the findings of the Judge, who tried this cause below, "That the entry of the plain-

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tiff into said premises was made under the mortgage sale and foreclosure;" and "that the defendant before the commencement of this action ratified and approved said sale." This being the case, it is too well settled to admit of a doubt that the respondent has a right of action for the balance due on the note secured by said mortgage.

Judgment below affirmed.

***JOSEPH VAN EMAN vs. SAMUEL STANCHFIELD et al.**

The complaint avers that S. B. O. made and delivered to the firm of J. & A. J. C. his certain promissory note dated Aug. 13, 1857, payable to their order four months after date, for one thousand dollars; that on the 21st of December, 1857, the payees for a valuable consideration transferred and delivered the same to one A. F., who was the owner, and held the same on the 18th of March, 1858; that on said 18th March, 1858, the defendants entered into a contract with S. B. O., whereby the latter sold to the defendants certain logs, and the defendants agreed to make payment as follows, viz: first to assume and take up the note held by A. F., and the interest thereon, to be paid on the 1st of December, 1858. This contract was signed by the parties and witnessed by A. F. That on the said 18th day of March, 1858, in consideration of said agreement, and to carry out the same, the said defendants made and delivered to said A. F. an agreement in writing, of which the following is a copy: "Whereas, S. B. O. has this day, March 18, 1858, sold and entered into a contract with S. & B. and J. D., [the defendants], for all his logs from St. Paul to head of Lake Pepin, the said S. & B. and J. D. have agreed to assume and pay a certain note now held by A. F., given to A. & A. J. C. by S. B. O., for \$1000; and we have agreed to pay the said note to A. F. on the 1st day of December, 1858, without interest after this date (March 18, '58) to December 1st, 1858; and if not paid at maturity, we agree to pay the said A. F. one per cent. per month until paid." That the note mentioned in the agreements is the note first mentioned in the complaint; that after the time mentioned in the contracts for the payment of the note, Dec.

*Mr. Justice Berry being of kin to one of the parties to this suit, took no part in its hearing or determination.

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1, 1858, A. F. demanded payment of the defendants; that no part of it has been paid; that after said demand and before the commencement of this action, A. F. sold and delivered the note to this plaintiff, and sold, assigned and transferred to the plaintiff all his interest in and to said contracts, and all his claim and demand arising out of the same against said defendants; that the plaintiff is now the owner and holder of the note. *Held*—that the complaint states facts which constitute a cause of action; that the two contracts mentioned in the complaint were concurrent in point of time and constitute but one transaction; that the sale by S. B. O. was the consideration of both agreements, and the second agreement contains a promise to A. F. to pay him the note; that there is, therefore, a privity of contract between the defendants and A. F., founded upon the consideration from S. B. O. to the defendants; that upon such a state of facts A. F. or his assignee may maintain an action.

Where a negotiable note payable to order is transferred without indorsement, the holder takes it as a mere chose in action, and while he may maintain an action upon it in his own name, he must prove the transfer to himself if denied, and mere possession is not *prima facie* evidence of ownership.

The rule that parol evidence is inadmissible to contradict or vary the terms of a valid written instrument, applies only between parties to the instrument and their privies.

This action was commenced in the Hennepin County District Court, by the plaintiff, against Samuel Stanchfield and William Brown, late partners as Stanchfield & Brown, and John Dudley, defendants. Issue was joined therein, and the cause came on for trial at the May term of said Court, 1864, before a jury, who returned the following verdict:

“Our verdict rendered in the case of *Van Eman vs. Stanchfield & Brown and Dudley*, is in favor of plaintiff, and that he recover as follows, to-wit:

“Note, \$1000.....	\$1000.00
Interest 1 per cent. a month five months.....	50.00
Interest to date after maturity of note, less from March 18 to Dec. 1,	
1858.....	392.38
Leaving due.....	1442.38”

A motion was made by defendants upon a statement of the case made and allowed, for a new trial; which was overruled, and defendants excepted; thereupon judgment was entered upon the

verdict in favor of plaintiff; from such judgment defendants appeal to this Court.

A sufficient statement of the case appears in the opinion of the Court.

F. R. E. & W. B. CORNELL, D. M. DEMMON and W. M. LOCHREN
for Appellants.

D. A. SECOMBE for Respondent.

By the Court—McMILLAN, J.—The complaint avers that one S. B. Olmstead made and delivered to the firm of J. & A. J. Chapman his certain promissory note, bearing date the 13th day of August, 1857, whereby he promised to pay to the order of said J. & A. J. Chapman five months after the date thereof, the sum of one thousand dollars for value received; that on the 21st of December, 1857, the said payees for a valuable consideration, sold, transferred and delivered the same to one Alexander Ferguson; that on the 18th of March, 1858, the said Ferguson was the owner and holder of said note; that on the said 18th of March, 1858, the defendants Stanchfield & Brown and Dudley, entered into a contract with said S. B. Olmstead, which is set out in the complaint of which the material parts are as follows: "This agreement made and entered into this day at St. Anthony, March 18, 1858, between S. B. Olmstead of the first part, and Stanchfield & Brown and John Dudley of the second part, whereas the party of the first part has this day sold all his logs, and all the logs he controls from St. Paul to head of Lake Pepin, or that may pass St. Paul through the year 1858, except what logs of his own are now in Lake Pepin Boom, unto the party of the second part, at the rate of four dollars and fifty cents per thousand; and it is further agreed by the party of the second part, to make payment as follows, viz: first, to assume and take up the following note given by S. B. Olmstead to J. & A. J. Chapman, dated August 13th, 1857, for one thousand dollars, made payable at the banking house of Bostwick, Pease & Co., now in the hands of Alex. Ferguson; also

the interest on said note, and the same to be paid on the first day of December, 1858. * * *

"Witness: GEO. S. BRADFORD,
ALEX. FERGUSON,

"S. B. OLMSTEAD,
STANCHFIELD & BROWN,
JOHN DUDLEY."

That on the said 18th day of March, 1858, in consideration of the said agreement and to carry out the same, the said Stanchfield & Brown and John Dudley made, executed and delivered to the said Alexander Ferguson an agreement in writing of which the following is a copy:

"Whereas, S. B. Olmstead has this day, March 18, 1858, sold and entered into a contract with Stanchfield & Brown and John Dudley, for all his logs from St. Paul to head of Lake Pepin, the said Stanchfield & Brown and John Dudley have agreed to assume and pay a certain note given to J. & A. J. Chapman by S. B. Olmstead, now held by Alexander Ferguson, for \$1,000, and we have agreed to pay the said note to Alexander Ferguson on the first day of December, 1858, without interest after this date, (March 18, 1858,) to December 1st, 1858, and if not paid at maturity we agree to pay the said Ferguson one per cent. per month until paid.

"STANCHFIELD & BROWN,
JOHN DUDLEY."

That the note mentioned in the agreement is the note first mentioned in the complaint; that after the expiration of the times mentioned in the contracts for the payment of the note to-wit: December 1, 1858, Ferguson demanded payment of the defendants; that no part of it has been paid; that after said demand and before the commencement of this action, Ferguson sold and delivered the note to this plaintiff, and sold, assigned and transferred to the plaintiff all his interest in and to said contracts, and all his claim and demand arising out of the same against the defendants. That the plaintiff is now the owner and holder of the note, &c.

The defendants answer separately: Stanchfield & Brown admit the execution of the agreements, but aver fraud on the part of Olmstead in the sale to them, and an entire failure of consideration by reason of a prior sale of all the logs to one John L. Young

and Isaac Crowe, and deny Ferguson's ownership of the note, and the plaintiff's title to the note and agreements; there is also a denial that they ever made any contract to or with Ferguson to assume, take up or pay the note. The answer of Dudley is similar, except that it admits the ownership of the note by Ferguson, and denies the execution of the second contract. The cause was tried before the District Court, and a verdict rendered for the plaintiff. On the trial several exceptions were taken by the defendants to the admission of testimony and to the charge of the Court.

The first question to which we direct our attention is whether the complaint states facts sufficient to constitute a cause of action. The action is based principally upon the two agreements set out in the complaint. It is contended by the defendants that the first agreement confers no right of action on Ferguson or his assignee, because Ferguson is not a party to the contract, and that no part of the consideration moved from him; and that the second agreement is void for want of mutuality and for want of consideration.

Without stopping at present to consider Ferguson's right under the contract between Olmstead and the defendants standing alone, let us consider the relation of these contracts to each other, and the rights of the parties under them jointly. The agreement first mentioned embraces the sale of logs by Olmstead to the defendants and their promise to assume and pay the note for \$1000, then held by Ferguson, with interest, on the 1st of December, 1858. The second agreement is, "Whereas, S. B. Olmstead has this day, March 18, 1858, sold and entered into a contract," &c., "the said Stanchfield & Brown and John Dudley have agreed to assume and pay a certain note," &c., "*and we have agreed to pay the said note to Alexander Ferguson,*" &c. Here is clearly a promise to Ferguson to pay him the note. Both these instruments appear to have been executed on the same day and at the same place. Ferguson was present at and witnessed the execution of the first instrument; in it the sale by Olmstead is in the form of a recital, in the past tense. The second agreement recites the sale in the same way, and refers to the agreements between Olmstead and the defendants and between the defendants and Ferguson in the

same manner, the past tense being used in each instance. We think, therefore, the conclusion is evident that these agreements were concurrent in point of time, and parts of the same transaction. Nor do we find any difficulty in the fact of a change to the present tense in the concluding clause of the agreement with Ferguson, for the same change of expression is found in the other instrument. We are, therefore, of opinion that the whole matter was embraced in a single transaction, consummated at the same time between the defendants, Olmstead and Ferguson, although evidenced by two separate instruments, and that the sale by Olmstead was the consideration of both agreements. And such seems to have been the conclusion of the Court, differently constituted, when the case was under consideration here on a former occasion. 8 *Minn.*, 518.

In this view of the case there is a privity of contract established between Ferguson and the defendants, founded upon the sale of the logs from Olmstead to the defendants. The case at bar, therefore, presents the question whether a person who is a party to a contract, but a stranger to the consideration, can maintain an action thereon.

"As between the plaintiff and defendant," says Story, "there must be a privity of contract, and if the plaintiff be a mere stranger to the consideration, and no promise be made by the defendant to him founded in privity upon it, the action is not maintainable by him, although a promise have been made by the defendant to pay the plaintiff. If, however, there be a privity between the parties, either party indifferently may bring the action. Indeed a privity of contract will always be implied when the promise or agreement is made in the presence of the third person with his consent." *Story on Contr.*, sec. 450.

The only case contravening the right of action in a case like the present, which we have met with, is that of *Edmundson vs. Penny*, 1 *Barr*, 334, in which the Court held that the plaintiff must unite in his person both consideration and promise, and that whenever they are separate the action must be sustained, if sustained at all, by drawing the one to the other, and that the consideration drew

to it the promise. Therefore, when a written promise was given to one man in consideration of services rendered by another, the right of action was vested in the latter, not in the former. But it is remarked in *Notes to American Leading Cases*, that it may be questioned whether, apart from the decision of *Edmundson vs. Penny*, any authority can be found on this side of the Atlantic in support of the naked proposition that the consideration must necessarily have moved from the party who brings the action; 2 *Am. L. C. (notes)* 124; and the decision in that case is directly in conflict with a subsequent decision in the same Court, in which the doctrine is broadly laid down that one for whose benefit and use a promise is made, if upon sufficient consideration, may maintain an action upon it. *Beers vs. Robinson*, 9 *Barr*, 229; citing 2 *Watts*, 104; 17 *Mass.*, 400; 4 *Watts*, 134. This is going further than we are called upon to go in this case. But the decision is sustained by an unbroken chain of authorities in New York and Massachusetts, and perhaps by the weight of authority in our country; although we think the Courts latterly incline to limit the rule when in their power. It is further to be remarked, touching the case of *Edmundson vs. Penny*, that the person rendering the services which formed the sole consideration for the note in that instance, was not a party to the contract, and in no way did his assent to it appear; and the Court manifestly treat the contract as one made for his benefit, and remark, that though the plaintiff is the representative of the beneficiary to receive the promise, he is not necessarily his representative to enforce it. Without, therefore, determining whether, in the absence of a privity of contract, a person who is a stranger to the consideration, but for whose benefit a promise is made, can maintain an action thereon, we are of opinion that where a privity of contract exists, a person for whose benefit a promise is made, with the assent of the party from whom the consideration moves, may maintain an action for a breach of the promise. Van Eman, therefore, as the assignee of Ferguson, had a right of action. This also disposes of all the objections to the admissibility of the contracts, and the assignments of them by Ferguson to Van Eman, the plaintiff.

This brings us to the question of the ownership of the note. The note was a negotiable instrument payable to the order of J. & A. J. Chapman, and was not endorsed by them. The answer of the defendant Dudley expressly avers the ownership of the note in Ferguson at the time of the execution of the agreements referred to, but Stanchfield & Brown in their separate answer take issue upon the transfer of the note from the payees to Ferguson and from Ferguson to Van Eman the Plaintiff. The only evidence of Ferguson's ownership *dehors* the agreements, is that of Ferguson himself; he says, "I have seen the note before; I held it on the 18th of March, 1858, and then held no other note of Olmstead's." This was the only evidence on this point before the note was received in evidence; subsequently the same witness testifies: "I received the note of Jerry Chapman, one of the payees of the note." On cross-examination he says, "at the time I received the note from Jerry Chapman I gave him a writing stating how it was received." The question was then put by defendants' counsel, "why was not the note endorsed when it was delivered to you?" which was objected to by the plaintiff, and the objection sustained; to which the defendants excepted. And the Court, in charging the jury, charged them distinctly that the possession of the note was *prima facie* evidence of ownership, which was excepted to by defendants. It may be doubted whether there is anything in the testimony of Ferguson which would sustain a verdict for the plaintiff. If, therefore, the Court, in the charge upon this point, was in error it was manifestly injurious to the defendants. That a party may acquire title to a negotiable note, and maintain an action on it in the absence of indorsement, is a question settled by this Court, in which we concur; but it does not follow from this that mere possession, by a third party, of a negotiable note payable to order, unendorsed, is *prima facie* evidence of ownership; nor do we understand the case of *Pease, Chalfant & Co. vs. Rush, Pratt and others*, 8 Minn., to go that length. The question in that case arose upon demurrer to the complaint. The complaint alleged that a certain firm were the payees of a certain promissory note; that subsequently to the making of the note a change in the firm

of the payees took place by the withdrawal of two members of the firm, and the sale of their interest to a stranger, the business being conducted by the new partnership under the same firm name. The Court held, upon this state of facts, that the title to the note passed to the new firm, although the note was not endorsed by the old firm. This was a question of pleading, not of evidence. The facts, which were admitted by the demurrer, showed a sale and transfer of the note by the old firm to the new firm, and if mere possession was *prima facie* evidence of ownership, it would have been entirely unnecessary to aver in the complaint the facts showing a change of ownership.

Where a negotiable note payable *to order* is transferred without endorsement, the holder takes it as a mere chose in action, and while he may maintain an action upon it in his own name he must prove the transfer to himself, and mere possession is not *prima facie* evidence of the fact. *Story on Prom. Notes*, sec. 381, 383; 3 *Wend.*, 69.

The charge of the Court, therefore, upon this point was erroneous.

The defendants offered in evidence, in support of the allegation of fraud and failure of consideration a bill of sale dated March 8, 1858, by Olmstead to John L. Young, of which the following is a copy: "I S. B. Olmstead of Fort Ripley in the county of Crow Wing Territory of Minnesota for and in consideration of one dollar to me in hand paid and divers other good and sufficient considerations me moving and of the indebtedness of said Olmstead to Isaac Crowe and John L. Young of the city of St. Anthony, I do hereby sell assign transfer and set over and convey to said Young all the logs belonging to and owned by me in the Mississippi river and along the shores thereof, and also in booms above the Falls of St. Anthony of the following marks, viz: [here follow the several marks,] containing one million feet more or less except the logs due I. F. Woodman of Minneapolis out of above. To have and to hold the same forever. Witness my hand and seal this 8th day of March, 1858. S. B. OLMSTEAD, [SEAL.]

In presence of C. Draper, Stephen Emerson."

This was objected to by the plaintiff as not purporting to convey the same logs mentioned in the complaint, and that it appears to have been altered as to punctuation. After the introduction of testimony as to the apparent alteration, the Court held that there was no objection to the paper, so far as any change or alteration was concerned; but that under the decision of the Supreme Court, the instrument only covered logs above the Falls of St. Anthony, and rejected the evidence, to which the defendants excepted.

The defendants then called as a witness John L. Young, who testified: "I bought logs of S. B. Olmstead, in March, 1858. The sale was in writing; it was under that instrument, [the bill of sale above set forth.]" The defendants then offered to show by the witness that in the spring of 1858, before March 18, the witness bought all the logs owned by Olmstead, including the logs which came into the possession of the defendants, being the same purchase mentioned by the witness, which was objected to as incompetent and excluded by the Court; to which the defendants excepted.

The defendants also offered to prove by the witness, that at and after the execution of the agreement, (above set forth,) on the 8th of March, the Vendor, Olmstead, personally pointed out and delivered to the witness, logs above and also below the Falls of St. Anthony, in the Mississippi river, and along its shores, of the marks specified in said agreement, and as being the logs conveyed and intended to be conveyed by said agreement, which was objected to as immaterial and incompetent, and excluded by the Court; to which the defendants excepted. The defendants then offered to show by the witness and others, that Olmstead, at the date of said agreement, in fact sold to Young all logs of the marks named in said agreement, which were in the Mississippi River, from its source to its mouth; that such was the agreement in fact between the parties, and that they all have always acted upon the supposition that the instrument included the whole of such logs, and that if said instrument does not by its terms convey the logs below, as well as those above the Falls of St. Anthony, the failure was through

the mistake of the scrivener who wrote the same; which was objected to as incompetent, and excluded by the Court: to which the defendants excepted.

This instrument has already been the subject of consideration in this Court; and it has been held that its construction was matter of law for the Court; that there was nothing in the least affecting its meaning which could properly be left to the jury, and the Court has construed it to embrace only logs above the Falls of St. Anthony. *Van Eman vs. Stanchfield et al.*, 8 Min. 518. It is true that at that time the want of punctuation in the instrument was adverted to, and that now there appears to be a comma after the words "shores thereof," which did not then appear in the copy of the instrument before the Court. But this is the only difference in the instrument, as then presented to the Court and as it now exists. We are unable to see that this materially affects the construction of the instrument. If in addition to this there was a comma after "St. Anthony," or after the word "booms," the punctuation would materially change the instrument. In the former case the construction claimed by the defendants would be clear, and in the latter the plaintiff's construction would obtain. But as it is, we can derive no assistance from the punctuation of the instrument, and the reasoning of the Court in the former case applies with equal force here. The comma appearing as it does in this instrument may increase the difficulty in the mind of the Court of arriving at the true intention of the parties, but if the difficulty can be solved it creates no ambiguity in the legal acceptance of that term. 1 *Greenl. Ev.*, sec. 229. And if an ambiguity does exist, it must arise upon the face of the instrument. For until the doubt as to the construction is removed there is no certain description of anything conveyed by the instrument, and when the doubt is removed there is no difficulty in the application of the instrument to the subject matter of the sale. The ambiguity therefore, if one exists, is a *patent ambiguity*, and parol evidence is not admissible to explain such ambiguity. But the rule that parol evidence is inadmissible to contradict or vary the terms of a valid written instrument, is applied only in suits between the

parties to the instrument and their privies. 1 *Greenl. Ev.*, sec. 279; 2 *Stark. Ev.*, (7 *Am. Ed.*) part 1, p. 790-793; 2 *Par. on Con.* p. 68-9; *Overseers of the Poor of New Berlin vs. The Overseers of the Poor of 'Norwich*, 10 *Johns.*, 229; *Krider vs. Lafferty*, 1 *Whart.*, 303; *Strader vs. Lambeth, &c.*, 7 *B. Monroe*, (Ky.) 589; *Chitty on Contr.*, p. 99, note 1, citing *Stewart vs. State*, 2 *Harr. & Gill*, 114.

The instrument offered in evidence is between Olmstead and John L. Young. The defendants are neither parties nor privies to the instrument, and Van Eman is beyond doubt an entire stranger to it. Under such circumstances we think it is competent for the defendants to show by extrinsic evidence what the agreement between the parties to the instrument offered really was. There was therefore error in excluding the testimony of the defendants offered for this purpose.

It was evidently an error in the jury to allow interest on the note at one per cent. per month from the date of the note to its maturity, amounting to fifty dollars, for by the terms of the note it drew no interest till maturity. This however would not require a new trial, unless the plaintiff should refuse to remit the excess.

For the errors specified, however, the verdict must be set aside and a new trial granted. The order denying a new trial is therefore reversed.

THE WINONA AND ST. PETER RAILROAD COMPANY vs. JACOB S.
DENMAN et al.

Under the charter of the Winona and St. Peter Railroad Company, in determining the compensation to be paid for the appropriation of land for railroad purposes, neither the commissioners nor the District Court are confined in their inquiries to the damage done to or the value of the strip of land actually taken for right of way.

It is proper for them to inquire into the effect of such taking upon the whole farm out of which the strip is taken ; and it makes no difference that the Court or Judge, as preliminary to the appointment of commissioners, have determined the title to the strip only.

In ascertaining such compensation, it is proper to enquire what is the value of the strip taken at the time when the question of compensation is passed upon by the commissioners.

The expense of building and maintaining additional fences rendered necessary by the construction of the road, is a proper element of damage.

Errors occurring on the trial prejudicial to the respondent, but not complained of by the appellant, will not in general be considered in the Supreme Court.

This is an appeal taken by the Winona and St. Peter Railroad Company from an order of the District Court of Winona County denying a motion for a new trial. A proceeding was commenced in said District Court by appellant, upon petition under its charter, for the right of way through the n. w. quarter of n. w. quarter and s. w. quarter of n. w. quarter, section 18, T. 107, R. 7 west, and n. e. quarter of n. e. quarter, of section 13, T. 107, R. 8 west, and lot 2 in section 13, T. 107, R. 8 west, and the s. w. quarter of the s. w. quarter of sec. 12, T. 107, R. 8 west, the property of Jacob S. Denman and wife, the respondents. The amount of land proposed to be taken was fifty feet on each side of a certain centre line described in said petition, and passing through said lands,

amounting to ten and thirty-six hundredths acres. An order was made by said Court determining the title to the lands proposed to be taken for such right of way to be in the respondents, and appointing three commissioners to ascertain and determine the compensation to be paid to respondents for the appropriation of such lands by appellant for right of way. The respective parties appeared before said commissioners on the 23d day of November, 1863, who filed their report, whereby they awarded to the respondents damages for such appropriation of said lands to the amount of \$400. Notice of the filing of said report was duly served upon the respective parties, and thereafter, and within the time allowed by law, the said Railroad Company duly appealed from the award of said commissioners to the said District Court. The said appeal was brought on for trial at a general term of said Court, held on the 30th day of March, 1864. Jacob S. Denman, one of the respondents, was called as a witness in his own behalf, and testified that he resided on a farm traversed by appellant's railroad, and among other things was asked the following question, viz: "How much land have you in that farm?" which question was objected to by appellant's counsel on the grounds: "1st, that (under the Company's charter) it is immaterial and improper to enquire concerning other lands than those proposed to be taken, the damages to which the commissioners were appointed to appraise, for the purpose of laying a foundation for damages; 2d, that the party is confined in his enquiries to the lands specified in the commission; 3d, that in no case can respondents go outside of the sub-division through which the road passes, the title to which has been ascertained and determined by the Court." The objections were overruled by the Court, and the appellant's counsel duly excepted to such ruling, and the witness answered: "I have 320 acres by legal sub-division, one is fractional, making about 312 lying in a body." Like evidence was elicited from other witnesses and taken under the same exception. On being further examined the witness was asked by respondents' counsel the following question: "What was the market value of the land taken last fall?" which was objected to by appellant's counsel on the ground—"that the value

of the land taken is not the proper measure of damages, but that the proper measure is the difference in the market value of the lands affected by the taking, without the Railroad and with it, and that general benefits conferred upon those lands, and other lands of the respondents, should be set off against the damage if any to the land taken;" and second, "that the value should be shown at the time the Company took possession." The Court overruled the objection, and ruled "that the proper time for fixing the value, is the time the commissioners passed upon the question." The Court also ruled, "that the land taken must be paid for in money, and that no benefits, general or special, could be set off against it, and that so much of the Company's charter as allows benefits to be set off against the value of the land taken, is in conflict with the Federal Constitution." To which ruling appellant's counsel duly excepted, and the witness answered: "The land taken was worth \$50 per acre on the 2d of November, 1863." Like evidence was elicited from other witnesses, and taken under the same objection. The Court also ruled "that as to damages beyond the value of the land actually taken, the jury might deduct therefrom any general benefits to respondents arising from the construction of this Railroad," to which ruling respondents excepted. The said witness was also asked the following question by respondents' counsel: "What additional amount of fences will be rendered necessary by the building of this road?" which question was objected to by appellant's counsel on the grounds: "1st, that it is immaterial and cannot be made the basis for the recovery of any damages whatever; 2d, that under the act of transfer of 1862, the company are not liable for fences." The objections were overruled and the appellant's counsel excepted, and the witness answered: "The distance is about seven-eighths of a mile," &c., &c. The said witness was also asked the following question by respondents' counsel: "What would it cost, per rod to build an ordinary fence?" which question was objected to by appellant's counsel upon the same ground as the last. The objections were overruled by the Court and the appellant's counsel duly excepted, and the witness answered: "It would cost \$1.50 per rod with sawed

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posts," &c., &c. The Railroad was constructed at the time the damages were assessed. The jury returned the following verdict, viz: "We, the jury, find a verdict for the respondent J. S. Denman, in the sum of seven hundred and fifty-eight and thirty-three hundredths dollars. We further find that the land appropriated by the road-bed, ten and thirty-six hundredths acres, was of the value of two hundred and fifty-eight and thirty-three one hundredths dollars, and that he sustained damages beyond in the sum of five hundred dollars, making in the aggregate the amount aforesaid." A motion was thereupon made by appellants for a new trial, upon a case made and settled, which motion was denied, and an appeal is taken from the order denying the same to this Court.

SARGEANT, FRANKLIN & KEYES for Appellant.

I.—The Court erred in allowing the witness, Denman, to testify for the purpose of laying a foundation for the recovery of damages, that he owned a greater quantity of land than was described in the petition of the appellant; the title to which had not been previously ascertained and determined by the Court.

1. In this proceeding the jurisdiction of the District Court is simply appellate, and its proceeding is governed in all respects as upon appeal from Courts of Justices of the Peace. *Laws of 1855, Chap. 27, Sec. 5.*

2. On an appeal from Courts of Justices of the Peace, no issues can be tried, except those tried in the Court below. *Comp. Stat., Chap. 59, Sec. 127.*

A party claiming damage to a piece of land described in the proceedings below, cannot, in the appellate Court, claim damages, in addition thereto, done to other pieces not so described, although the several pieces may be occupied as one farm.

3. The commissioners had no right or authority to award damages to the respondents, upon any lands not described in the petition. The Court had not ascertained the title to any other lands, and could only award damages to the parties for the title to, or interest in the lands proposed to be taken, according to the extent

of title to, or interest in the same, which the Court had ascertained they severally possessed. *Laws of 1855, Chap. 27, Sec. 5; The Canandaigua and Niagara Falls Railroad Co. vs. Payne, 16 Barb., (S. C.), 273.*

If the respondents were damaged, or claimed to be damaged in lands other than those described in the petition, it was at least their duty to appear before the Court upon the presentation of the petition, and before the commissioners were appointed, make their claim, satisfy the Court of their title to or interest in such other lands, and have the petition amended so as to embrace the same, or have the same embraced in the order of the Court. And not having done so, they must be deemed to have waived the assessment of damages, as to such other lands in their proceedings, and should not have been allowed to include them in such assessment upon the trial in the District Court.

II.—The Court erred in holding and deciding that the land taken must be paid for in money, and that no benefits, general or special, could be set off against the value of the land taken, and that so much of the Company's charter as allows benefits to be offset against the value of the land taken, is in conflict with the Federal Constitution.

1. Private property can only be taken for public use. *Embury vs. Conner, 3 Comst., 511.*

2. Under constitutions like the Federal, in so far as the right to take private property for public use is concerned, the public have the constitutional authority to take, hold and convey the fee. *Rexford vs. Knight, 15 Barb., 627; Heyward and others vs. The Mayor, Aldermen and Commonalty of the City of New York, 3 Seld., 314; Rexford vs. Knight, 1 Kernan, 314.*

3. Where the fee is taken for public purposes, the benefits accruing to the owner from the construction of the improvement, in the enhanced value of the land, a part of which is taken, or of that which lies contiguous to and connected therewith, may be constitutionally set off against the value of the land so taken, as well as against the damages arising from such taking, to that portion of the land not taken. *Rexford vs. Knight, 15 Barb., 627.*

4. In the case at bar the fee of the land is not taken for the use of the public. By the terms of the Company's charter, only an easement is acquired. *Laws of 1855, Chap. 27, Sec. 4 and 5.*

5. The rights of the respondents to, and authority and control over the lands upon which the easement is imposed, are unimpaired as against all persons, except the Company, and they cannot use it for any purpose inconsistent with the enjoyment of the easement acquired. *Barclay vs. Howell's Lessee*, 6 Pet. R., 498; *In the matter of John and Cherry Streets, in the city of New York*, 19 Wend., 656, 666; 3 Kent's Com., 432-3, and cases there cited.

The respondents being the owners of the soil, have a right to all ordinary remedies for the freehold. They may maintain an action of ejectment for encroachments upon it, or an assize if dis-seized of it, or trespass against any person who digs up the soil or cuts down any trees growing upon it. The freehold and profits belong to them. They may carry water in pipes under it, and have every use and remedy that is consistent with the servitude or easements of the Company over it.

6. In a case like this, the question is not, what is the value of the land taken? but, what damage has or will the owner sustain by reason of the imposition of the easement upon it. The act sounds in damages only; and the mode prescribed in the Company's charter, (*Sec. 5, Chap. 27, Laws of 1855*), for estimating the same, is not in conflict with or in violation of any provision of the Federal Constitution. *Rexford vs. Knight*, 15 Barb., 627; *McMasters vs. The Commonwealth*, 3 Watts, 294; *Commonwealth vs. Coombs*, 2 Mass., 491; *Id. vs. Sessions of Norfolk*, 5 Mass., 436; *Id. vs. Sessions of Middlesex*, 9 Mass., 388; *Betts vs. The City of Williamsburgh*, 15 Barb., 256; *Livingston vs. Mayor of New York*, 8 Wend., 85; *Dwight and others vs. County Commissioners of Hampden*, 11 Cushing, 201; *Pennsylvania Railroad vs. Hiester, McClure & Reiley*, 8 Barr, 445; *Livermore vs. Town of Jamaica*, 23 Vt., (8 Washt.,) 361; *Matter of Furman Street*, 17 Wend., 650, 670; *Matter of William and Anthony Streets*, 19 Wend., 690; *Troy and Boston Railroad Co. vs. Lee*, 13 Barb., 169; *Niagara Falls Railroad Co. vs. Payne*,

16 Barb, 273; *Smith's Com. on Statutory and Constitutional Construction*, 469 et seq.; *McIntire vs. The State*, 5 Blackf., 384; *The State vs. Digby*, 5 Blackf., 543; *Indiana Central Railroad Co. vs. Hunter*, 8 Ind., 74.

The rule for measuring the damages prescribed in the charter, and sustained by the cases referred to, is by no means new or peculiar. It is only the common law rule extended to the assessment of damages prospectively. What is the market value of the entire piece of property in the absence of the improvement? And what will it be when such improvement is made? And if the whole property will be as valuable after the improvement is made, or the road is constructed, as it was before, then the party is entitled to no damages, and if not, then to the amount in which the same will be depreciated.

III.—The Court did not err in holding and deciding that as to damages, beyond the value of the land actually taken, the jury might deduct therefrom any general benefits to respondents arising from the construction of the Railroad. *See cases before cited.*

IV.—The Court erred in allowing the witness Denman and other witnesses, to testify as to any additional fences that might be made necessary by the construction of the Railroad, and the cost of building the same, as an item of damages allowable to the respondents.

1. At common law, the proprietor of land is not obliged to fence it. That obligation is only imposed by prescription or contract, or by statute. *Wells vs. Howell*, 19 *Johnson's R.*, 385; *Rush vs. Low et al.*, 6 *Mass.*, 90.

This principle has equal application to the owners of land adjoining public highways; and where no statutes exist and no obligation is imposed by covenant or prescription, a railroad company is not bound to fence their land. *Hurd vs. Rutland and Burlington R. R. Co.*, 25 *Vt. R.*, 157-8; *Morse vs. Id.*, 27 *Vt. R.*, 49.

So it follows that a party cannot recover damages for that which he is not legally bound to do or suffer.

2. By *Sec. 19, of Chap. 3, of the Laws of 1857*, it was provided upon this subject, that the company should "construct and

maintain a good and substantial board and rail fence, four and one-half feet high, on both sides of their road."

This statute is not declaratory of any principle known to the common law, but imposes a duty and an obligation upon the company entirely unknown to that law, and under it, as a matter of course, no party would be entitled to have damages assessed against the company on account of fences.

3. By *Sec. 4, of Chap. 19, of the Laws of 1862*, it is provided: "That whenever the owner or occupant of any land through which said road shall pass, or adjoining the line of said road, shall enclose with a fence his or her lands, bounded in part by said road, said company shall construct and maintain its portion of the same, in the same manner that individuals are, or may be required by law, to erect and maintain partition fences, and all fences erected on the line of said road by said company, or by the owners or occupants of lands along the line thereof, shall be considered partition fences, and be, in all respects, governed by the laws in force regulating the same."

And by *Sec. 13, of the same Chap.*, all acts or parts of acts inconsistent with or repugnant to the provisions thereof, are repealed.

It would seem, from this mode of legislation upon the subject, that the Legislature intended to relieve the Company from a portion of the burden, in this regard, which it had imposed upon them by the act of 1857, before referred to, rather than to merely change it, from the performance of the act to paying for its performance. And this view of the subject seems all the more clear from the circumstance, that, in case the Company are compelled to pay the owner of the land for building and maintaining his half of the fence, they have no remedy by which they can compel him to do it.

The order of the Court below should be set aside and a new trial granted.

NORTON & MITCHELL, for Respondent.

I. The owner of the land taken for Railroad purposes is not confined in the estimate of damages for the taking and by the

building of the road, to the particular strip taken, or the particular parcel, enclosure or lot from which it is taken, such as a forty acre tract; but the whole contiguous farm lying together in a body, and cultivated as such, may be considered as to the effect thereon, the convenience or facility of its after use, the facility of communication and approach, &c., as proper subjects in estimating damages. The cases all assume this, as the proper course, not only in arriving at an estimate of damages, but also in estimating benefits to be deducted.

The doctrine advanced by appellant would limit the enquiry to the particular strip of 100 feet taken for the road-bed; for that is all that is described in the petition or in the order of the Court or report of the Commissioners. Such a rule would be quite as fatal to their right to go outside of the road-bed to prove benefits, as it would be to that of respondents to go beyond it to show damages. It is inconsistent with the very rule for estimating damages which the appellant himself subsequently claims. It is inconsistent with the provisions of the charter itself, which speaks of "compensation for the taking or injuriously affecting such land in real estate." *Session Laws of 1855, page 86*; 2 *Zab.*, 295; 6 *Wis.*, 643; 4 *Cush.*, 298; *Redfield on Railways, page 178-9*; 5 *Rich.*, 428; 22 *Vermont*, 387.

II.—The Court correctly held that for the land *actually taken*, the Railroad Company must pay in *money* and not in supposed benefits to other lands not taken. The terms "compensation" and "compensation in money" are convertible terms. The constitution of the United States requires, not that the public shall decide whether a party shall be entitled to *any* compensation, but that a *just compensation* shall be paid for the property taken. And that compensation implies at least the value of the thing taken. No citizen can be compelled to give his land without an equivalent. And that equivalent can be nothing else but the value in money of the thing taken. Nothing else is a legal tender either from individuals or from the public. *Constitution of United States, Art. 5 of Amendments*; 6 *Wis.*, 636; 5 *Ohio State*, 163;

5 *Dana*, 33; 9 *Dana*, 115; 4 *Chandler*, 72; *Pierce on Railways*, 212.

In this case the benefits were exceeded in amount by damages beyond the value of the land taken. Hence the ruling of the Court, even if an error, would be no ground for reversal of the judgment.

III. The court erred in holding that general benefits might be deducted from damages sustained beyond the value of the land actually taken. It is almost universally conceded that general benefits ought not as a matter of right to be deducted. Only special damages are allowed to be proven by the claimant. And only special or accidental benefits ought to be allowed as against special or accidental damages.

Many states have set this question at rest by constitutional provision. And those Courts which still allow general benefits to be deducted, do so generally with reluctance and simply because they are bound by judicial precedents or express provisions of statute. These general benefits are the precise object for which the public grant these rights and franchises to private corporations. They were designed for all; they belong to all; and may be claimed by all.

To allow these to a corporation is unjust, because it establishes for the corporation what is done for no one else, a sort of right in the property of others to the reflected benefits of its improvements, itself submitting to no reciprocity by affording others a compensation for the effect of their improvements upon the property of the corporation.

There is nothing in the charter of the appellant requiring "general benefits" to be deducted. The words used are, "the benefits to accrue to the claimant by the construction of the road."

Such statutes as this are to be construed strictly as against the corporation.

A construction contrary to natural justice, is to be rejected, unless the language of the statute is so plain as to admit of no other construction.

And we submit that when the statute speaks of "benefit to accrue to the claimant," it by no means necessarily refers to general benefits which were intended for all, belong to all, and can be claimed by all.

General benefits have been in numerous cases excluded by the ablest Courts of our country, in cases where the provisions of statute were substantially similar to the present. 4 *Cushing*, 291; 6 *Wisconsin*, 636; 4 *Chandler*, 84; 5 *Ohio State*, 147, (*Opinion of Burtley, J.*); 4 *Ohio*, 288; *Redfield on Railways*, page 135; *Pierce on Railways*, 207.

IV.—The Court properly allowed evidence in regard to extra fence rendered necessary to be built on account of taking the right of way through respondents' farm. Such evidence is properly admissible as constituting one of the items of direct injury to the farm.

The act of March 10th, 1862, has no bearing whatever on this question except so far as it regulates the amount of fence each has to build. It is merely a police regulation. The Legislature might have required the owner of the land to build the whole of the fence. In such case the whole of the extra fence would properly be taken into account in assessing damages. In the present case, only half of such fence can be taken into account. If the act of 1857 had remained in force, this fence would not have entered into the case at all as an item of damages.

As a general rule, an enumeration of the various circumstances tending directly and immediately to depreciate the value of the premises are proper to be considered, among which is the item of extra fencing.

This evidence is admitted, not with the idea that the owner will have to build so much extra fence, and therefore that he should be allowed a definite price for a definite amount of a certain kind of fence, as a distinct consideration from the depreciation of the value of the premises; but on the idea that it is to be taken into account, and is a proper subject of enquiry for the purpose of ascertaining the difference in the market value of the premises before and after the taking of the right of way, just as the inconvenient

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shape in which the farm is left, difficulty of access caused by deep cuts or high embankments, or any other circumstance of that kind may be taken into the account.

The cases universally hold such evidence admissible; and this is done independent of the question whether the claimant has to build the whole fence, or only one-half, as in this case. 6 *Wisconsin*, 636; 2 *Clarke*, (*Iowa*), 309; 4 *Paige*, 553; 4 *Chandler*, 82; *Redfield on Railways*, 369; 31 *Maine*, 215; 5 *Rich.*, 428; 23 *Vermont*, 386; 10 *Indiana*, 120.

In conclusion, it is conceded that on some of the points raised in this case, especially that in regard to the deduction of general benefits, there is much conflict of authority. This was perhaps to be expected, in view of the fact that the whole matter was a new subject before our Courts, none of the decisions dating back farther than a few decades. These questions are conceded to be (in the absence of any peculiarities of statutory provisions) legitimate subjects for judicial construction by our Courts. Wherever free from precedents or special statutory enactments, our Courts are fast settling down upon the following rule, which is generally conceded to be founded in equity and in accordance with constitutional requirements, viz:

That when land is taken by a Railroad Company for its use, the owner is entitled to recover.

1. The actual value of the land taken in money, without diminution on account of benefits or other set-off.

2. Such damages as he actually sustains, resulting immediately and directly from the proper construction of the road, but not for remote or speculative damages.

3. That in estimating such damages there is to be taken into account and deducted such benefits only as are peculiar to the owner and not enjoyed in common by the community.

Such a rule, founded as it is in common justice, the Courts of our State, untrammelled like those of other States, by judicial precedents, or statutory enactments compelling them to adopt any different construction, ought, we believe, to adopt as the law of this State for all time.

By the Court—BERRY, J.—Under the special act relating thereto, commissioners were appointed to ascertain and determine the compensation to be paid to the respondents for the appropriation of certain lands by the appellant for right of way. From the determination of the commissioners an appeal was taken to the District Court for the county of Winona by the present appellant.

The appellant moved for a new trial on sundry exceptions to the instructions and rulings of the court, and the case comes to this Court on appeal from an order denying the motion. On the trial below, the respondent, Jacob S. Denman, was called as a witness in his own behalf, and testified that he resided on a farm traversed by appellant's railroad. Question. How much land have you in that farm? This question was objected to by the appellant's counsel, on the ground, "(1) that under the charter it is immaterial and improper to enquire concerning other lands than those proposed to be taken, the damages to which the commissioners were appointed to appraise, for the purpose of laying a foundation for damages. (2) That the party is confined in his inquiries to the lands specified in the commission. (3) That in no case can respondent go outside of the subdivisions through which the road passes, the title to which has been ascertained and determined by the Court." The objection was rightly overruled. The mode of proceeding in a case of this kind is prescribed in *Section 5 of Chapter 27 of the Laws of 1855*, and without entering into details of verbal criticism, it is sufficient to say, that although the phraseology of different portions of the section is somewhat varied, in speaking of the same thing the difference is in words, not in meaning. Looking at the whole section, it is clear that the object of the Legislature was to provide a way for ascertaining the amount which should be paid as a *compensation* for the appropriation of land to the purposes of the contemplated railroad. And as this was to be a taking of private property for public uses, nothing short of *compensation* would satisfy the requirements of the Federal Constitution, under which the original charter of 1855 was granted, or of the Constitution of this State, under which the rights so granted were imparted to the appellant.

See *Amendments to Const. U. S., Art. 5; Const. Minn., Art. 10, Sec. 4.* According to approved lexicographers the primary signification of compensation is "equivalence," and the secondary and more common meaning is something given or obtained as an equivalent. We take it that the latter is the sense in which the word is used in the constitution and in the law referred to; and that whatever is necessary to be considered in order to determine what is an *equivalent* for the appropriation of private property is germane to the question of compensation. Now, without indulging in any metaphysical refinements, it is plain that the appropriation of a strip of land (as in this case) one hundred feet in width across and out of the body of a larger tract used and occupied as one farm, by which the farm is divided, and divided perhaps with great inconvenience to the owner, may be and in a great majority of cases would be a serious injury to the farm as a whole.

And to say that the payment of the value of the strip by the acre and by itself would be a compensation or equivalent for the appropriation would be worse than unreasonable. As to the objection that it is improper to enquire into the effect of the appropriation upon any lands other than those the title of which has been determined by the Court as preliminary to the appointment of commissioners, it is to be remarked, first, that in this case the Court only determined the title to the one hundred feet strip; second, that there is no provision in the charter requiring the Court to determine anything beyond this; and, third, that there is nothing prohibiting the commissioners from determining any fact which is necessary, in order to arrive at the just compensation to which the party interested is entitled. Now, if in order to ascertain what amount will be a compensation or equivalent for the proposed appropriation, it is necessary, as we have already determined, to take into account the effect of the appropriation on the whole farm, it follows in the absence of anything to the contrary, that it is the duty of the commissioners to enquire what the extent of the farm is; that is, in other words, how much land the party damaged is the owner of, and this of course involves the determination of title. And to say that this is an unusual way

of settling title to real estate would not furnish a valid objection; and at any rate the party who considered himself aggrieved has the right of appeal to a court which, in the exercise of its ordinary and constitutional jurisdiction, is authorized to adjudicate upon questions of this nature.

There is nothing in the language of the order appointing the commissioners, which is inconsistent with this view of the matter. We see no force in the point that the District Court was only authorized to exercise an appellate jurisdiction, for while this is true there is nothing to show that there was any attempt to exercise any other. There is nothing to show that the commissioners did not act upon the views which we have expressed, and enquire into the ownership of the adjoining lands.

Whether they took into consideration in making their estimate all the facts of which the law authorized them to take cognizance is moreover unimportant.

The appeal is to be "entered, proceeded in, and determined in the same manner as cases on appeal from courts of Justices of the Peace;" that is to say, there may be a re-trial of the issues involved, and new evidence may be introduced in regard to matters which might have been contested below, without reference to the question whether they were or were not so contested. The respondent was also asked "what was the market value of the land taken last fall?" The then last fall was the time when the assessment of damages was made by the commissioners. The appellant objected to the interrogatory on the ground that the value is not the proper measure of damages, but that the proper measure is the difference in the market value of the lands affected by the taking without the railroad and with it, and that general benefits conferred upon these lands, and other lands of the respondents, should be set off against the damage if any to the lands taken.

It will be observed that this is a departure from the ground upon which the appellant based the objections which we have already considered. But we are unable to perceive how or where there was any impropriety in the question, even if the rule contended for in the objection be correct. The quantity and the value of the

land actually taken from the respondent, and so to speak *lost* by him, were certainly proper elements in calculating the depreciation of his property, and in instituting a comparison between its value without and with the railroad.

In fact it is difficult to perceive how the comparison could well be made without an estimate of the loss which he suffered. Even upon the theory that the correct standard of damages is the difference in value between the land with and without the Railroad, it would not be necessary even if proper to put the enquiry in this general form: "What is the difference between the value of the land with and without the railroad?" For an intelligent answer to that question must be the result of a process of calculation, and it is certainly quite as proper to ask for the steps of that process, (one of which must be an estimate of the value of the property actually taken,) as it is to ask for the general result. As to that part of the objection which contends that general benefits to the lands taken, and other lands of the respondent, should be set off against the damage to the lands taken, we might as well say here as any where, that the question as to the right to set off benefits, general or special, is not necessarily raised in this case. For it appears that the Court below ruled that benefits might be set off against the damages to the lands outside of the lands actually taken, and the jury in their verdict under this ruling, find damages to such outside lands. In other words, the jury find that the benefits which they were authorized to set off against damages to such outside lands were exceeded by such damages, and return a verdict for the balance. This being so, whether benefits could be set off against the value of the strip actually appropriated is not a practical question in the case, as such benefits were all deducted from the damages to outside lands, and none were left for further deduction. But the other branch of the objection made by the appellant to the question as to what the value was *last fall*, is "that the value should be shown at the time the company took possession." We think this branch of the objection also untenable. The right which the company sought to obtain in this case, not having been acquired by purchase or gift, could only be ac-

quired by proceedings through a commission, as pointed out in the charter. These proceedings, the company, and not the land owner, had the right to set on foot at any time, and before any expenditure had been made upon the land. If the company sees fit to go on and put the road in operation before assessing the land damages, and is in consequence compelled to pay an enhanced price corresponding with the general advance of property as the country grows older, it was in its power to prevent such a result. There is nothing in the charter fixing the time the value at which is to furnish the standard of compensation. The company acquire no right, and the land owner parts with none until the action of the commissioners; and it would seem to be not unfair to the company, that the valuation should be made as at the time when it was passed upon by the commissioners. It was further contended on the argument that all enquiries as to value and damages should have been based upon the idea that the company did not take the fee, but simply an easement. It is unnecessary to determine in this case what estate or interest the company acquire. The charter specially provides that the commissioners are "to ascertain and determine the amount to be paid * * * as compensation for his *interest or estate*," to the person interested in the land appropriated.

Whether the Legislature were of the opinion that the company should be allowed to take the fee or an easement, this provision requires compensation for the *interest or estate* of those interested in the land without reference to the quantity or quality of such interest or estate, and it may be suggested that even if the company could take only an easement, what would be left to the land owner consistent with the enjoyment of the easement by a railroad company? and even his reversion, would ordinarily be of inconsiderable or no appreciable value, and the Legislature might with perfect fairness provide for compensation for the whole interest or estate of those claiming any right to the lands.

Objections were also made to the evidence offered by the respondents, for the purpose of showing the additional expense of fencing occasioned by the construction of the road.

Keeping in view the idea of *compensation*, we think the objections were rightly disregarded. The evidence would tend to show what additional expense, resulting from the construction of the Railroad, would be incurred by the respondent in order to make his adjacent land available for the ordinary purposes of good husbandry. It was proper for the jury to take this into consideration.

The law regulating the matter of fencing was read to the jury, and there was no chance for mistake as to the liability of the company to build one-half of the fence by the terms of the law. For the other half, the cost of erecting and maintaining which would fall upon the respondent it was proper to award compensation. It was objected by the *respondents* that the Court erred in holding that general benefits should be deducted from the injury to lands other than the strip appropriated for right of way. But as this ruling was favorable to the appellant, who finds no fault with it, and as the respondent does not appeal, and as we deny a new trial, it is unnecessary to consider the objection at this time; and we may say in general that the subject of the deduction of benefits general or special in cases similar to this is not necessarily before us in the case under consideration. The question is one of very great importance in the infancy of our railroad system, and presents intrinsic difficulties which are greatly enhanced by the diversity of opinion in the adjudged cases. Upon this as well as some other questions which were raised upon the trial we refrain from expressing any opinion which, as it would not be necessary, would be regarded as little better than an *obiter dictum*.

The order denying the motion for a new trial is affirmed, and the action remanded.

JOHN MAYALL et al. vs. JOHN BURKE et al.

The Clerk of the District Court appended to his return certain papers not filed in his office, and which he was prohibited from filing by the order of the Court below. On motion they were stricken from the return.

An appeal does not lie from a mere refusal of the District Court to entertain a motion.

A motion was made at a special term of the District Court of Hennepin County on the part of the plaintiffs, for an order to change the place of trial of this action, based upon the affidavit of one of the plaintiffs, and the reply in the action. Upon the hearing of the motion, the Court made the following order :

"The counsel for the defendants objects to the reception of the affidavit, on which this motion is claimed to be based, on the ground that the same and also the reply of plaintiffs to the answer of Catharine Burke, are scandalous and impertinent. An inspection of these papers has satisfied me that the same were willfully and intentionally drawn, for the purpose of manifesting contempt and disrespect for the Court, and that the same are in violation of all rules of propriety and good order in judicial proceedings, and cannot be received or entertained by the Court. The Clerk is directed not to receive the papers in question upon the files of the Court, and the plaintiff and his attorney are directed not to repeat a like offence. The motion therefore fails."

The plaintiffs appealed from such order, and the Clerk of the District Court appended to his return the affidavit and reply over a special certificate, which appears at length in the opinion of the Court. When the appeal was brought to a hearing, the counsel for respondents moved this Court, that the said affidavit and reply be stricken from the return, which motion was granted.

L. M. STEWART for Appellant.

F. R. E. CORNELL for Respondents.

By the Court—BERRY, J.—The Clerk below appended to his return to this Court, and over the following certificate, two papers, one purporting to be a change of venue, and the other a reply to the answer of the defendants in this action :

“State of Minnesota, County of Hennepin, ss:—I, H. O. Hamlin, Clerk of the District Court for Hennepin County, do hereby certify that the papers next preceding this certificate and next after my first certificate of attestation in the foregoing entitled action, are the identical papers referred to in said order or decision denying said motion, and directing the Clerk not to receive the same upon the files of this Court.

Signed.”

A motion to strike the certificate and papers from the return was granted. The papers had not been filed in the Clerk's office, and he could have no official knowledge respecting them, so that his certificate was unauthorized and extra official. *Daniels vs. Winslow*, 2 Minn., 117; 6 Minn., 542.

These papers having been stricken from the record, there is nothing before this Court except the motion for a change of venue, and the direction of the Court below from which the appeal is taken. The action of the Court below (if such it may be called) seems to have been a refusal to entertain the motion for a change of venue, or in other words to have been a refusal to act. The right of appeal is statutory. *Myrick vs. Pierce*, 5 Minn., 67. And we are aware of no provision of statute which gives an appeal in cases of this kind. We are cited to *Pub. Stat.*, 673, Sec. 25. If this statute be in force (upon which we express no opinion) it would not seem to reach the case of a refusal to act. At any rate since the affidavit and reply are stricken out, there is nothing here which would enable us to review or examine the proceedings of the Court below.

The appeal is dismissed.

CATHARINE BURKE vs. JAMES H. MAYALL et al.

Errors of judgment do not amount to prejudice or ill will on the part of a Judge so as to authorize a change of venue.

A motion was made at a general term of the District Court of Hennepin county, in May, 1864, on the part of the defendants, upon the affidavit of defendant Mayall, to change the place of trial of this action. The Court denied the motion, and filed the following decision, viz:

"This motion is made to change the place of trial of this action for alleged prejudice of the presiding judge. Upon such a motion, under our statute, the facts and circumstances upon which the charge of prejudice is based must be set out so that the Court can determine whether there is probable cause for granting the motion.

3 *Minn. R.*, 274.

"A Court can not, therefore, from motives of delicacy, transfer a cause for such alleged reason unless the same appears properly established. A different rule might lead to great abuses in practice, and causes could be sworn away from one district to another, as in a Justice Court from one Justice to another, upon the pretext of prejudice, but really for other and different purposes.

"The grounds which would render a judge liable to a charge of this kind, I suppose, may be substantially such as would render a juror liable to be challenged for bias—for implied bias for reasons stated in *subdiv. 1, 2 and 3, sec. 23, p. 774, Pub. Stats.*—or for actual bias, being the existence of a state of mind such, in reference to the case, that he could not try the same without prejudice to the rights of a party, the facts showing which should appear.

"Thus, whether the judge is intimately acquainted with the parties, or either of them; whether he has had difficulty with the defendants, or formed or expressed any opinion in relation to the merits of the case; whether he knows anything of the case outside of the record, or has in any way occupied a position in reference to either party such as to bias his mind or render him likely to prejudice the case in favor of the plaintiff. It would seem to be reasonable to require facts of this kind to appear. The mere fact that the judge is alleged to have made erroneous decisions in the case, or even to have erred in the exercise of judicial discretion, would not, of itself, raise the legal presumption of prejudice in the mind of the Court.

"Tested by this rule, it will be readily seen that no case is made by the affidavit used on this motion, and it must, therefore, be denied.

"C. E. VANDERBURGH, Judge."

From the order denying the motion the defendants appeal to this Court.

The grounds upon which the motion was made, as stated in the affidavit, sufficiently appear in the decision of the District Court, and in the opinion of this Court.

L. M. STEWART for Appellants.

The affidavit upon which the motion for change of venue was based, showing clearly a state of facts in relation to the conduct of the judge towards the appellants totally incompatible and inconsistent with an unprejudiced and impartial state of mind on his part, and alleging besides that the appellants feared and believed that they would not receive a fair and impartial trial before him, on account of his ill will and prejudice, and that they believed that his prejudice and ill will against them were so great that they would be unsafe in submitting and going to a trial before him, entitled them to a change of venue, and it was error to deny the granting of it. *McGoan v. Little*, 2 *Gilman Ill. R.*, 42, cited in 7 *U. S. Digest*, 479; *Clark vs. The People*, 1 *Scammon's Ill. R.*, 117.

F. R. E. CORNELL for Respondent.

I.—The affidavit to procure a change of venue is wholly insufficient in not stating any facts upon which the charge of prejudice can be predicated. Prejudice will not be presumed from an erroneous decision; neither is an erroneous decision ground for a change of venue. 3 *Minn. R.*, 274; *Pub. Stats.*, 537, secs. 1, 2.

II.—To warrant a change of venue on account of the prejudice of a judge, substantially the same facts must be shown as would constitute a good ground of challenge to a juror for bias, actual or implied. The object of the statute is to guard against the danger of an impartial trial, and not to regulate the place of trial by the whims, caprices, or insane apprehensions of parties. *Public Stat.*, secs. 22, 23, p. 774.

By the Court—BERRY, J.—The motion for a change of venue in this action, made by the appellant in the Court below, purports to be based on prejudice and ill-will on the part of the Judge of the District Court.

Our statute regulating this subject found upon page 537, *Pub. Stat.*, Secs. 44, 45, provides that a party may apply for a change of venue by petition, setting forth the cause of the application, and "accompanied by an affidavit verifying the facts stated in the petition."

From the language of the statute requiring a statement of *facts*, as well as from the construction heretofore put upon the statute by this Court, in *Ex parte Gold T. Curtis*, 3 *Minn.*, 274, it would seem that the general charges and conclusions of prejudice and antipathy found in the verified petition upon which the motion was made would be insufficient. Aside from these general statements it appears that there have been six different proceedings of one kind and another having relation to the foreclosure of a certain mortgage in which the appellant claims to be interested; and the appellant alleges that there have been six erroneous decisions of various kinds in reference to matters arising in the course of these

several proceedings, and it is contended that these errors can only be accounted for on the ground of prejudice and ill-will on the part of the Judge. Now while it is very possible that some of these decisions may have been erroneous in point of law, and while it is certain that the holders of the mortgage have had an unusual experience of the "law's delay," we see no evidence that the Judge below was prejudiced against the appellants, or actuated by any other than the purest and fairest motives in making the various decisions, which the appellant claims to have resulted in depriving him of his just and legal rights. No appeal appears to have been taken from any one of these decisions. From some of them the defendant could have appealed, and thereby (it is to be presumed) have obtained justice, if errors had been committed. We arrogate nothing when we say that the theory of our judicial system is that Courts of *nisi prius* may commit errors of judgment in matter of law which are to be reviewed by Courts of last resort, and to hold that such error in one instance or repeated instances, (which would seem to be all that the appellants can claim in this case,) is equivalent to prejudice, would lead to absurd consequences. We are aware of no authorities which go to this extent. The right to a particular place of trial is fixed by law for wise reasons, and no party should be sent away from that place of trial, unless the grounds for a change of venue unmistakably appear.

The order denying the motion for a change of venue is affirmed.

ROYAL LOVELL vs. THE CITY OF ST. PAUL.

When street certificates have been issued to a party under and in pursuance of the provisions of *sec. 10, chap. 7, of the Amended Charter of the City of Saint Paul*, the city is not liable on said certificates, or for the work and labor on ac-

count of which they were issued. In the assessment and sale of the lots (chargeable) for the amount due on the certificates, the city acts for the certificate holders. The city neither assumes nor guarantees the payment of said certificates, nor becomes liable to the holders thereof by proceeding to collect the amount due thereon, nor by reason of the fact that said lots for want of bidders are struck off to the city.

This is an appeal from an order of the Ramsey County District Court sustaining a demurrer to the complaint.

The allegations of the complaint and grounds of demurrer are sufficiently stated in the opinion of the Court.

BRISBIN & WARNER for Appellant.

S. M. FLINT and H. J. HORN for Respondent.

By the Court—WILSON, C. J.—The complaint in this action alleges, “that during the year 1857 said defendant was and ever since has been and now is a corporation, erected and existing under and by virtue of the following laws, viz: * * and during said year A. D. 1857, and for a long time before and after said year, one L. Marvin, William Branch and C. H. Schurmeier, were Aldermen in and for the First Ward of said city, and by virtue of said acts were the street commissioners in and for said ward, and T. M. Metcalf, during said year A. D. 1857, and for a long time before and after said year was the Comptroller in and for said city, and on the first day of December, A. D. 1857, said street commissioners executed under their hands, and caused to be countersigned on the 4th day of said December, A. D. 1857, by the then Comptroller of said city and gave to one S. W. Furber, in part payment for the grading of a portion of that public street of said city and ward called Seventh street, let by contract to the lowest bidder, that is to say, said S. W. Furber, upon the notice of the time and place of letting such contract, a number of instruments called street certificates, whereby such commissioners and comptroller certified to the effect that S. W. Furber aforesaid had completed and performed the said contract, and

that the work done thereunder amounted to the sum of \$10,396.64. By certificate No. 471 said commissioners certified that at the date thereof there was due from lot No. 3 in Block No. 31, in Kittson's addition to said city, on account of such work, the sum of \$86.01, with interest from the date thereof at the rate of 30 per cent. per annum, and by certificate No. 504, said commissioners certified &c., and in and by every of said certificates, said commissioners and comptroller certified that they could be transferred by indorsement, and that each and every of them were issued in accordance with *Section 10, Chapter 7 of the Amended Charter* of said city of Saint Paul, and that the amount due or to become due to the bearer thereof, were to be collected in accordance with the provisions of said charter; and thereafter said S. W. Furber endorsed, and for value received, delivered, and for value paid plaintiff in the usual course of business in good faith and without notice of any informality in their inception, and relying on the counter-signature of said comptroller, and before the maturity thereof purchased and received said certificates, which were and are numbered respectively, * * and no part of the moneys due, according to the tenor of plaintiff's said certificates, was paid before the making out of the next annual assessment roll of said city, whereupon the plaintiff returned the same to the said comptroller of said city as unpaid, and for collection pursuant to said law; and thereafter, in the year A. D. 1858, said defendant, by its officers and agents, incorporated plaintiff's said certificates, and the moneys due according to the tenor thereof, into its assessment roll for said year A. D. 1858, and in pursuance of said laws undertook to collect the same as other legally authorized taxes of said city were collectable, and to pay over to the plaintiff the amount due thereon as aforesaid, and a reasonable time for such collections and payments has long since elapsed, and on the 7th day of March, A. D., 1859, said defendant by its officers and agents, caused the land above described (which then exceeded in value the amount due thereon respectively as aforesaid,) to be sold at tax sale on account of the non-payment of said certificates; and at such tax sale defendant purchased each and every of said

lands for the amount due upon plaintiff's said certificates respectively, and said defendant now owns and holds all said lands in fee simple, free and discharged from the liens of plaintiff's said certificates, and heretofore the plaintiff in person and by agents, demanded of the defendant payment of the money due upon his said certificates, yet the defendant neglected and refused to pay the same."

To the complaint the defendant demurred, specifying as ground of demurrer that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was sustained by the Court below and the plaintiff appealed.

Sec. 10, of Chap. 7, of the Amended Charter of said city referred to in the complaint, and in pursuance of which said certificates were issued, is in the following language:

"After the completion and performance of any contract entered into by the said commissioners for work chargeable to lots or lands, by virtue of this act they shall give to the contractor or contractors, a certificate under their hands stating the amount of work done by such contractor or contractors, the value thereof and the description of the lots or parcels of land upon which the same is chargeable, which said certificates may be transferred by endorsement thereon, and which shall bear interest at the rate of 30 per cent. per annum, and if the amount thereof be not paid by the time of making out the annual assessment roll, the same shall be assessed on said lots or parcels of land respectively, and collected for the use and benefit of the holder of said certificates as other taxes are collected, by virtue of this act or by civil action at the suit of a bona fide holder of said certificate against the owner or owners of said lots or lands, and if notice to do the work required shall have been given as herein provided, no informality or error in the proceedings shall vitiate such assessment; provided, that in no event when such work is ordered at the expense of any lots or parcels of lands, shall either the city or ward be responsible for the payment thereof."

Sec. 16, Chap. 8, of the Charter of said city, which was in force in 1857, is in the following language: "If at any sale of
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land or personal estate for taxes or assessments, no bid shall be made for any parcel of land or any goods and chattels, the same shall be struck off to the city, and thereupon the city shall receive in the corporate name a certificate of the sale thereof, and shall be vested with the same rights as other purchasers are."

If the defendant is liable in this action, it must be either on account of some act of omission or commission unauthorized or forbidden by law or the contract, and prejudicial to the plaintiff, or because the law establishes a claim in plaintiff's favor. The sections of the charter above quoted, are the only statutory provisions that we are aware of prescribing the rights and liabilities of parties in this class of cases, and these sections were in force when the work was done and said street certificates delivered. The plaintiff, therefore, (or his assignor,) is presumed to have known the law, and to have contracted with reference to it—the law was in effect incorporated into the contract. The acts of the defendant in the premises done as required by the law, were done in pursuance of the contract and by the authority of the plaintiff; and as it is admitted that the defendant has acted strictly in pursuance of the law, if the plaintiff has suffered any damage by such acts, it is *damnum absque injuria* for *volenti non fit injuria*.

We will now enquire whether "the law establishes a claim in plaintiff's favor?" The law we think does not establish, but unmistakably denies such claim. *Sec. 10, Chap. 7 of the Charter*, provides that the street certificates shall show on their face that they are a charge on the lots therein described, (not a charge against the city.) It also provides that in case of a sale, the money shall be collected *for the use and benefit of the holder of the certificate*. After anticipating and providing for the event of such sale, it expressly provides that "*in no event,*" shall the city or ward be responsible for the payment, &c. We think it too obvious to admit of doubt that the legislature by this section intended to provide that the city should not be liable for such demands or claims as that of the plaintiff in this action, and such being their intention they could hardly have used language more apt and unmistakable.

Sec. 16, Chap. 8 of the City Charter, is relied upon by plaintiff as showing the liability of defendant. That section it will be observed applies to tax sales generally under the City Charter, and not peculiarly to this class of cases. If there is any seeming discrepancy, therefore, between these statutory provisions, the particular or special must control the general. *Sedgwick on Stat. Law*, 433. In framing a section with reference to tax sales, generally, it is not to be supposed that the Legislature had before their minds so particularly the respective rights and liabilities of the city and certificate holders, as they had when framing a section on that particular subject. That *Sec. 10, of Chap. 7*, is repealed, is not material. The rights of the parties had vested under that statute, and the repeal did not disturb or vary them. *Sedgwick on Stat. Law*, 13, and cases there cited.

The fact that the plaintiff is an assignee of these certificates gives him no greater right than his assignor had. The form of the certificates was notice to him of the circumstances under which they were issued, and of the fact that they were a charge only on the lots therein described. The contract was entered into voluntarily by the parties with full knowledge of the law governing it, and the rights of the parties under the contract can not be varied by either the Legislature or the Courts. With the propriety or expediency of the law, we have nothing to do.

We hold, therefore, (1) that in the assessment and sale of said lots on account of the non-payment of the sum due on the certificates, the city acted *for* the holders of said certificates; (2) that the city neither assumed nor guaranteed the payment of said certificates, nor became liable to the holders thereof for the amount due and uncollected, by proceeding as required by law to collect the amount due thereon, nor by reason of the fact that said lots were for want of bidders struck off to the city.

Order appealed from affirmed.

DAVID D. STUART vs. JOHN S. WALKER, Treasurer of Hennepin County.

When lands sold for taxes under *chapter 4 of Laws of 1862* have been redeemed, the County Treasurer is by law required to pay over to the purchaser the *full amount* for which such property sold, with interest on such amount from the day of sale to the time of redemption, without making any deduction therefrom for fees.

This was a submission of a controversy without action, to the District Court of Hennepin County. The case agreed upon by the parties, containing the facts upon which the controversy depended, is substantially as follows:

On the 26th day of January, 1863, one D. W. Campbell was the owner of certain lands in Hennepin County, on which there was then due for State and County taxes, interest and charges, the sum of four dollars and seventy-five cents; that on that day the defendant, as Treasurer of Hennepin County, having given the notice required by law, did, at the office of the Auditor of said county, sell said lands at public auction, to said plaintiff, for said sum, in pursuance of an act of the Legislature of said State approved March 11, 1862; that on the 9th day of May, 1863, said Campbell redeemed said lands from said sale, by paying to defendant, as such Treasurer, the sum of five dollars and nineteen cents, which was the amount necessary to redeem the same, that thereupon the plaintiff demanded of defendant the said sum of five dollars and nineteen cents. The defendant, claiming he was entitled to three per cent. of said redemption money as his fees, refused to pay over said sum without first deducting such fees.

The case was submitted to said Court at a general term in November, 1863, and the Court rendered its decision thereon as follows:

"The question presented for the decision of the court is, whether under *Chapter 4 of Laws of 1862*, the County Treasurer is entitled to deduct from the redemption money paid into his hands for the use of the purchaser under said act, his per centage for receiving the same. As the statute in question contains no such authority, it becomes necessary to examine whether it exists by virtue of any other statute.

"Under the Revised Statutes, it was made the duty of the Register of Deeds to receive and pay over redemption money, and to execute the proper certificates. *Comp. Stat.*, 242, *sec. 9, 89*. The purchaser under that act received (*sec. 86*) the sum paid and twenty-five per cent. per annum interest. No per centage was allowed to the officer for such services.

"The new tax law of 1860 provided that a penalty of twenty per cent besides the interest should attach to the whole amount paid and expense incurred in such redemption, and also provided a different manner for effecting a redemption. *Laws 1860, chapter 1, secs. 87, 89*. And section 89 requires the application for the redemption money to be made to the Auditor who draws his warrant upon the Treasurer for the amount upon payment of his fees, and the Treasurer pays over the money, deducting his fees.

"It will be seen that under this act of 1860, the penalty attaches immediately, so that in no event, however soon the redemption might take place, could so novel a provision as that entertained in section 88, allowing fees to be deducted from the sum paid, deprive the purchaser of a fair return for his investment.

"But the law of March 11th, 1862, in question, is an independent and separate act, passed for a specific purpose, and in section nine has made specific and different provisions for the manner of effecting redemptions under that act. (Compare this section with said sections 87 and 89, or any of the amendments thereto.) Under this act neither the auditor or treasurer are required to perform any services for the purchaser subsequent to the delivery of the tax deed.

"The law provides that all the proceedings of the purchaser may be defeated and his tax deed annulled, by the redemptioner's pay-

ing the amount required by the act within one year to the treasurer *for the use of the purchaser*, and recording the Treasurer's certificate.

"The certificate is given to the party redeeming, and not upon the request of the purchaser nor for his benefit. It is plain, I think, that the provisions of *sec. 89, Laws 1860*, are inapplicable in such case.

"It is not for the benefit or convenience of the purchaser that the law requires the money to be deposited in a public office instead of being paid to him in person, and therefore it would require a very clear expression of the intention of the Legislature requiring fees for such deposit to be paid by him before the courts would adopt a construction which would work injustice and in some cases positive loss.

"It is urged that it could not have reasonably intended that the treasurer should perform such services without being paid for them. The Legislature have it in their power, and very often do in their discretion, annex duties to an office for which no particular fees are chargeable, especially where public interests are involved, or where the particular services enjoined grow out of or are connected with other services for which fees are allowed. This goes on the ground that the fees or salary already allowed by law to such officers for general duties are a sufficient compensation for him. As it is in the power of the Legislature to raise or lower the fees of public officers, so also they may increase or diminish the amount of his duties.

"The decision, therefore, of this court is, that the Treasurer is not entitled to deduct his percentage from the redemption money paid into his hands for the use of the purchaser under the law of March 11th, 1862, and judgment is accordingly directed for the plaintiff.

"C. E. VANDERBURGH, Judge."

The defendant appeals to this Court.

WILSON & MCNAIR for Appellant.

Cunningham v. La Crosse and St. Paul Packet Co.

L. M. STEWART for Respondent.

By the Court—WILSON, C. J.—The decision of the Court below in this case is correct. *Sec. 9 of chap. 4 of Laws of 1862*, provides that the amount for which the property sold, with interest on such amount from the day of sale to the time of redemption, shall be paid to the County Treasurer *for the use of the purchaser or his assigns*. The exact sum which the purchaser is entitled to receive is thus fixed by the letter of the statute.

A provision as plain as this cannot be explained away or modified by any doubtful implication, and on doubtful implication alone does the appellant rely to countervail the force of this positive enactment.

Judgment below affirmed.

JOHN CUNNINGHAM VS. LA CROSSE AND SAINT PAUL PACKET
COMPANY.

In an application for a certiorari to a Justice's Court, the presentation of the affidavit required by *sec. 124, chap. 59, Comp. Stat.*, within twenty days after the rendition of the judgment, is an essential requisite to the authority of the Judge to allow the writ of certiorari.

The omission to state in the affidavit that the application is made in good faith and not for the purpose of delay, renders the affidavit substantially defective, and the Judge has no authority to allow the writ; nor is the affidavit amendable.

John Cunningham, the respondent, brought an action against the La Crosse & St. Paul Packet Company, appellant, before a Justice of the Peace of Ramsey County, and recovered a judgment therein on the 28th day of November, 1862. An affidavit was presented to the Judge of the District Court of said county, on the part of said Company as plaintiff in error, against said

Cunningham as defendant in error, and a writ of certiorari was issued thereon on the 18th day of December, 1862. The cause was brought to a hearing at a special term of the District Court on the 29th day of January, 1863, and a motion was made on the part of the defendant in error to dismiss the writ, on the ground that the affidavit on which the same had been allowed was insufficient, in not stating that the application for such writ was made in good faith and not for the purpose of delay. The counsel for plaintiff in error offered to amend the affidavit by causing the omitted allegation to be inserted, and the same as amended to be verified, and moved for leave to make such amendment. The Court denied the motion for leave to amend, on the ground that it had no authority to allow the same, and granted the motion to dismiss the writ; and the plaintiff in error appeals to this Court.

LORENZO ALLIS for Appellant.

I.—The Court erred in not allowing plaintiff in error to amend his affidavit.

Our statute provides that "whenever any proceeding taken by a party fails to conform in any respect to the provisions of the statutes, the Court may permit an amendment of such proceeding so as to make it conformable thereto." *Comp. Stat., chap. 60, sec. 90, p. 544; Bouvier's Law Dictionary, Title Amendment Practice, p. 98, and authorities there cited; 1 Burrell, 476 et seq.; Dickson vs. Seelye, 6 John., 327; Flannegan vs. Murphy, 2 Wend., 291; Clark vs. Lawrence, 1 Cow., 48; Phillips vs. Brainard, 2 Cow., 440.*

II.—The affidavit is in no sense jurisdictional. It is made to inform the Judge of the ground of the application. The allowance of the writ is a judicial act of the Judge, based on the information presented to him. If the Judge is satisfied that any error affecting the merits of the controversy has been committed, he is authorized to allow the writ. *Comp. Stat., (126) sec. 113, p. 516.*

It is from the affidavit and from that only that the Judge is to be "satisfied." When this affidavit has "satisfied" the Judge

and he has allowed the writ, the affidavit is *functus officio*. The order of allowance is the jurisdictional act, for it is the first judicial act in the premises. Upon this order the writ or mandate for the removal of the cause issues.

The certiorari does not issue upon the affidavit, but upon the order of the judge. It is error, therefore, to dismiss a writ which has been regularly allowed and executed because of a defect in the affidavit upon which the writ was originally granted. The affidavit has once "satisfied" the Judge, and has performed its office. It is too late to inspect its defects.

GRANT & FREEMAN for Respondents.

The District Court was right in refusing to permit the plaintiff in error to amend the affidavit.

I.—Because it had never acquired jurisdiction of the action.

II.—Because the affidavit was the jurisdictional paper.

III.—Because the time within which a writ could issue had passed.

IV.—The statute of amendments does not apply to this case.

V.—There was nothing in this case to show that the defect in the affidavit was a clerical error.

VI.—The application to amend was addressed to the discretion of the Court, and this Court will not interfere with the exercise of this discretion. *See Comp. Stat., page 515, Sec. 124.*

By the Court—McMILLAN, J.—The statute regulating the removal of causes from Justices' Courts by certiorari, provides that "The party applying for such certiorari, his agent or attorney, shall within twenty days after the rendition of such judgment, present to a Judge of a court of record an affidavit stating that in his belief there is reasonable cause for granting such certiorari for error in such judgment, (setting forth the ground of error alleged,) and that the application is made in good faith and not for the purpose of delay," &c. *Comp. Stat., page 515, Sec. 124.*

The statute further provides, "If such Judge shall be satisfied

that any error affecting the merits of the controversy has been committed by the Justice or Jury in the proceeding, verdict or judgment, he shall allow a writ of certiorari by endorsing on the affidavit his allowance thereof. *Comp. Stat.*, page 516, *Sec. 126*.

The presentation of the affidavit, provided for in the section first cited, within the time limited, is an essential requisite to the authority of the Judge to allow the writ of certiorari. *Bunday vs. Dunbar*, 5 *Minn.*, 444.

The statute prescribes what the affidavit shall contain, and a substantial compliance therewith is as necessary as that the affidavit be presented within the twenty days limited by the statute. There are three substantive matters required in the affidavit. First, a statement that in the belief of the party applying for the writ there is reasonable cause for granting such certiorari for error in the judgment. Second, the grounds of error alleged must be set forth. Third, a statement that the application is made in good faith and not for the purpose of delay.

As this proceeding is regulated entirely by the statute, we have no authority to regard either of these requisitions as matter of form, but must consider them all as matters of substance and equally essential.

In this instance there is a total omission of the statement that the application is made in good faith and not for the purpose of delay. The affidavit, therefore, was substantially defective, and the Judge had no authority to make an order allowing the writ.

As the defect is one of substance, and goes to the jurisdiction of the Judge to allow the writ, we do not think the affidavit was amendable.

The statute of New York under which the decisions referred to by the counsel for the appellant were made, required only that "The party intending to apply for such certiorari shall make or cause to be made an affidavit setting forth the substance of the testimony and proceedings before the Justice, and the grounds upon which an allegation of error is founded. 2 *Rev. Stat.*, 255. "It is well settled," says Savage, Ch. J., considering this section, "that no supplemental affidavit affecting the merits can be regu-

larly presented after the twenty days (the time limited by the statute) have expired." *The People vs. Albany, C. P.*, 12Wend., 264. And in the cases cited by the counsel for the appellant, the supplemental affidavits were regarded as explanatory of collateral facts, and not as supplying substantial defects in the original affidavit, which, the same authorities concur in saying, cannot be done.

We are therefore of opinion that the amendment was properly refused.

The order of the Court below is affirmed.

L. M. BROWN vs. HATHAWAY & BRIGGS.

A docket kept by the Clerk of the Court, marked in gilt letters "Register of Actions," and in writing "Judgment Book," contained a series of entries, the last of which was without date and in the following form: "Judgment entered against defendant and in favor of said plaintiff for three hundred and twenty-eight dollars and fifty cents [\$328.50]." All the entries preceding it and with which it was connected were mere minutes of the proceedings in the action. *Held*—that the entry referring to judgment was a mere minute of the entry of judgment.

A docket entry which is a mere minute is not admissible to prove a judgment.

This is an action of ejectment. The complaint alleges that the plaintiff is seized and possessed of the title in fee simple, to certain real estate in Shakopee; that the defendants are in possession and occupancy of the same, and refuse to deliver possession to the plaintiff. The plaintiff demands judgment for possession, &c. The answer denies the plaintiff's title, and alleges title in the defendants. The premises in question were formerly owned by one William Phillips, and the same were levied upon and sold by the Sheriff April 19, 1862, under and by virtue of an

alias execution, issued upon a judgment against said Phillips in favor of one E. G. Barkhurst, purporting to have been recovered March 31, 1856, and the plaintiff (Brown) in this action purchased at said sale, and the usual certificate was made and filed. It does not appear that any deed was ever executed to such purchaser, (Brown,) though the time of redemption expired before the commencement of this action. Plaintiff claims title by virtue of the certificate of sale. The cause was tried at the general term of the District Court in Scott county, in April, 1864, without a jury. On the trial the plaintiff offered in evidence certain memoranda, or entries in a certain book of record of said court, the only designation of the character and contents of which was as follows, to wit: on the back side of one of the covers was indorsed in large ink letters the words "Judgment Book;" on the back edge of said book, at the top thereof, was endorsed in ink letters, 1st, the words "Judgment Book"—second, the word "*Records*," in gilt letters—third, the words, "Register of Actions and Judgment Book," in ink letters. The entries offered in evidence were in respect to the suit of E. G. Barkhurst against William Phillips, upon a note, commencing with the entry of the filing of the summons and complaint on the 11th September, 1855, with other entries of the proceedings in the cause, from time to time, to and including the 31st March, 1856; the last of the entries offered in evidence being without date, and as follows: "Judgment entered against defendants, and in favor of said plaintiff for \$328.50." The defendant objected to the same as incompetent, irrelevant, and immaterial. The Court overruled the objection, and admitted the memoranda, or entries, and the defendant's counsel excepted. Further evidence was offered on the part of the plaintiff, of the issue of an alias execution upon the judgment referred to in the memoranda, or entries, and of the proceeding, &c., under such execution, which was admitted by the court under objection by defendant's counsel. It was proven by the clerk of the court, that there was no other record of said judgment in his office, except the said memoranda, and entries, and that there was no other book, among the records of his office, for the entry of judgments

at the time said memoranda and entries purport to have been made, except the book containing the same, put in evidence; that there is also an entry of the docketing of said judgment under date of 31st March, 1856. The plaintiff offered in evidence the said entry of the docketing of said judgment, which was admitted under the objection of defendant's counsel, that the judgment had not been proved, and that it did not appear that any judgment roll had ever been made or filed.

The Court decided that said plaintiff recover against the said defendant the premises in question, with costs, &c.; upon which decision judgment was entered, and defendants sued out a writ of error, and removed said action to this Court.

LORENZO ALLIS for Plaintiffs in Error.

I.—The entries or memoranda in the Register were inadmissible to prove a judgment; or, if admissible at all were clearly insufficient. A judgment is proved by the record. The memoranda received in evidence were no record, and proved no judgment. *See Comp. Stat., p. 566, secs. 72, 73, 75, 76.*

II.—The judgment may be docketed "on filing a judgment roll." It does not become a lien on real estate until it is docketed. In the case at bar, *non constat*, that there was any Judgment Roll. Hence there is no proof that the judgment was ever a lien on the real estate in question.

III.—But the judgment not being proved, there was no foundation laid for proving the proceedings on said judgment. Hence the *alias* execution, the return thereto, and the certificate of sale of the real estate, were improperly admitted in evidence; and if admitted, proved nothing without the judgment.

IV.—The return to the execution failed to show a levy under the statute, it not appearing that a certified copy of the writ and sheriff's return was left at the office of the register of deeds. *Session Laws of 1860, chap. 61, p. 282; Comp. Stat., p. 568, (88) sec. 91.*

V.—This being an action of ejectment, the plaintiff must re-

cover on the strength of his own title. It is, therefore, wholly immaterial whether the mortgage foreclosure proceedings, under which defendants claim, were regular and valid or otherwise.

L. M. BROWN for Defendant in Error.

I. Whenever it becomes necessary to prove a judgment of a court of Record, the original entry of such judgment is the best evidence, and must be produced, or its absence must be accounted for, before any secondary evidence can be resorted to.

The District Court of the late Territory of Minnesota was a court of record, and also a court of general jurisdiction, and whenever an original entry of a judgment is found in the Judgment Book of such a court, jurisdiction to render such judgment is presumed. The evidence therefore offered in this case by the plaintiff below, was the only evidence that he had any right to offer. He could not have introduced the copy of the judgment which is attached to the judgment roll.

II. The statute provides that "the Clerk must keep among the records of the court a book for the entry of judgments, to be called the Judgment book." The book that was offered in evidence was thus kept and thus called. *Comp. Stat., chap. 61, sec. 72.*

III. The judgment that was offered was the original entry of the judgment. It specified clearly the relief granted. *Sec. 73, Chap. 61, Comp. Stat., 566.* The judgment offered fully complies with every requisite of the statutes. *Sec. 166, chap. 60, Comp. Stat., 554.* Any and all entries made in the book belonging to the clerk's office, are presumed to be made by the clerk of the court. He is nowhere required by law to sign his name to such entries. The judgment showed a final determination of the rights of the parties. It was entered in a book called the "Judgment Book." See *Statutes above referred to; Corning v. Powers and others, 9 How. P. R., 54.*

By the Court—McMILLAN, J.—The first error assigned is that the entries or memoranda in the Register were inadmissible to

prove a judgment; or if admissible at all, were clearly insufficient.

On the trial the plaintiff in error objected to the record offered to prove the judgment, which objection was overruled, and the record admitted, to which the plaintiff in error excepted.

By *sec. 40, chap. 72, Comp. Stat., p. 630*, it is provided that "the clerk must keep among the records of the Court a register of actions; he must enter therein the title of the action with brief notes under it from time to time of all papers filed and proceedings had therein."

By *secs. 72 and 73, ch. 61, Comp. Stat., p. 566*, "the clerk must keep among the records of the Court a book for the entry of judgments to be called the judgment book."

"The judgment must be entered in the judgment book, and must specify clearly the relief granted or other determination of the action."

Section 76, of the same chapter, provides that the judgment may be docketed, and shall thereupon become a lien on the real property of the defendant in the county from the time of docketing, and *section 78* requires the Clerk to keep a judgment docket, and prescribes the mode of docketing. It will be perceived that there are three books to be kept by the Clerk: 1st, a register of actions, containing minutes of all proceedings in each action; 2d, a judgment book in which judgments shall be entered; and 3d, a judgment docket in which the judgment shall be docketed.

An examination of the record offered in evidence in this case, as contained in Schedule A, in the paper book, in view of these provisions of the statute, satisfies us that it is a minute of the proceedings in the action. That this is the character of all the entries except the last, cannot for a moment be doubted. The entry referring to judgment is not dated, nor is it in form a judgment, but like each entry preceding it, and with which it is connected, it is in form a mere note or memorandum of the action of the Court, which is required to be kept by *sec. 40, chap. 72, cited ante*, and is clearly distinguishable from the entry of the judgment as required by *sec. 72, chap. 61*. It must therefore be regarded as a mere minute of the entry of judgment.

Docket entries which are merely minutes of proceedings are not admissible as evidence of a judgment. 4 *W. C. C. R.*, 698.

As the statute expressly requires that the judgment shall be entered in the judgment book, and specify clearly the relief granted, or other determination of the action, the record offered was incompetent to prove the judgment, and erroneously admitted for that purpose. In the absence of proof of the judgment, of course all the evidence based upon the fact of a judgment was inadmissible. Proof of the judgment being vital to the plaintiff's case, and no competent evidence of judgment having been offered, he could not recover.

The judgment must therefore be reversed.

ANNA E. AGNEW vs. JAMES H. MERRITT et al.

The obligation not to give time to the principal depends upon a knowledge of the real character in which the surety entered into the contract. If, therefore, the fact of the suretyship does not appear on the face of the contract, the surety will not be discharged from liability in consequence of a variation of the contract, if at the time of the act complained of the creditor had not notice that the relation of suretyship existed; and such notice is not presumed in favor of the surety, but must be proven.

The complaint in this action states substantially that on and prior to the 13th day of September, 1855, the plaintiff owned and was seized in fee of certain real estate in Dakota County, and still owns and holds the fee thereof; that Edward C. Agnew, the husband of plaintiff, on or about said 13th September, negotiated a loan of \$600 of one Ira Bidwell, *for his individual use and benefit*; that the joint promissory note of said plaintiff and said Edward C. Agnew was given to said Bidwell for the said sum of \$600, payable two years from date with interest, &c.; that the

plaintiff and said Edward C. Agnew, to secure the payment of said note, duly executed to said Bidwell a mortgage upon said real estate, which was duly recorded, &c. ; that on or about the 4th of May, 1858, the said Bidwell assigned and transferred said note and mortgage to the defendants, and the assignment was duly recorded; that after said transfer and assignment, *and without the knowledge or consent of plaintiff*, the said Edward C. and the defendants, computed the amount due on said note, which with other sums then loaned to said Edward C., amounted to the sum of \$1,100, and that in pursuance of an agreement with said Edward C., the defendants took four certain promissory notes made by said Edward C. and one Dixon, amounting to the sum of \$1,100, dated May 4, 1858, payable eleven months from date with interest, &c. ; that a portion of said \$1,100 was the same indebtedness secured by the note and mortgage executed by plaintiff and said Edward C. ; that to secure the payment of said four notes, said Dixon at the request of said Edward C., executed a mortgage to said defendants upon certain of his real estate in Dakota County which was duly recorded, &c. ; that on or about the 22d of August, 1859, said defendants foreclosed the mortgage of the 13th September, 1855, and bid off the premises therein mentioned for the sum of \$1,000, and the proper evidence of such foreclosure has been duly recorded in said county, and is a cloud upon plaintiff's title ; that the defendants have possession of said real estate, and claim an estate therein in fee simple, under said mortgage and foreclosure and sale. Plaintiff prays judgment that said mortgage of her said estate be ordered to be satisfied of record, and that said foreclosure and sale be set aside, and that she be restored to her full and former estate in and possession of said lands. Several issues of fact were raised by the answer. The cause was tried before the District Court of Ramsey County without a jury. The Court in its decision found the facts, so far as they are pertinent to the points decided by this Court, substantially as alleged in the complaint, and dismissed the action. The plaintiff excepted to the decision of said Court, and appeals to this Court.

A. R. CAPEHART for Appellant.

A *feme covert* being incapable at common law of making contracts, and merely enabled by statute to convey and encumber her real estate by joining in a deed with her husband, appellant's signature to the promissory note imparted no personal liability, nor authorized the inference that the debt was hers; but on the contrary the legal presumption is that the debt was her husband's. 12 *How. Pr.*, 17; *Id.*, 333; *Id.*, 501.

II.—The debt being the husband's, and the property pledged for its payment, the wife's, the relation thus established is that of suretyship, and whatever is sufficient to discharge a personal surety, will release appellant's property from the lien of the mortgage. 1 *Maddock's Ch.*, 585; 2 *Story's Eq.*, Sec. 1373; 11 *Wend.*, 318; 3 *Minn.*, 202; 18 *N. Y. Ct. Appeals*, 265; 22 *Id.*, 450.

III.—Appellant, being a *feme covert*, was as much incapable of making a contract with respondents, or with her husband, to extend the time of payment of the debt, as she was incapable of making any other contract. 1 *Blacks.*, 442, 445; 2 *Story's Eq.*, Sec. 1367.

IV.—The extension of the time of payment by an agreement between the principal and creditor, supported by a good and sufficient consideration, without the knowledge or consent of the surety, discharges his liability. 2 *Am. Lead. Cases*, pages 232 to 327; 5 *Hill*, 463; 3 *Denio*, 512.

V.—The transaction between Agnew and respondents extended the time of payment of a debt then overdue eleven months, and was supported by a good and sufficient consideration, so binding upon respondents that they could not sue Agnew on the old note, nor proceed to collect the debt in its new form until the expiration of said time, which transaction released the lien upon appellant's property. 25 *N. Y. Ct. Appeals*, 479.

VI.—The Judge after finding the above facts, finds as a conclusion of law that appellant's property is not released, because it did not appear that there was an express agreement to give time

on the old note and mortgage. The new notes and mortgage imported a contract in writing, which the law declares to be valid promises to pay the respective sums of money expressed upon their face, eleven months after date, and not before the expiration of that time. Parol evidence is inadmissible to contradict or vary such a contract. 5 *Minn.*, 310.

LORENZO ALLIS for Respondents.

Whether the debt was that of the husband exclusively, or was contracted for the benefit of the wife, in either case the property is bound by the mortgage duly executed and acknowledged by the husband and wife, to secure the debt. *Story's Eq. Juris.*, sec. 1373; *Wolfe et ux. vs. Banning et al.*, 3 *Minn.*, 207; *Gahn vs. Niemcewicz*, 11 *Wend.*, 312.

There was no novation. Nor was there any extension of time given for the payment of the first note and mortgage; nor any agreement to forbear suit upon or the collection of the first note and mortgage. There is nothing alleged to show that the respondents put any restraint whatever upon themselves as to the first note and mortgage upon receiving the last notes and mortgage. The interests or rights of the appellant were and could be in no way prejudiced or injuriously affected by this latter transaction.

In no case does the mere taking of additional security without any extension of time for the payment of the principal debt, or other agreement injuriously affecting the status of the parties liable on the original debt, discharge the sureties. *Chitty on Contracts*, 468, and *authorities cited*; *Story's Eq. Juris.*, Sec. 326; *Gahn vs. Niemcewicz's Ex.*, 11 *Wend.*, 320-3.

The complaint further shows that the first mortgage was duly foreclosed by the respondents, and the property duly purchased by them at the mortgage sale, and that the time for redemption had expired, and that the title of respondents to said premises under said foreclosure proceedings had been perfected before the commencement of this action.

By the Court—WILSON, C. J.—A wife mortgaging her separate property for the debt of her husband, is entitled to all the rights and remedies of a personal surety.

A contract, therefore, by the creditor with the principal debtor, (without her assent,) to extend the time of the payment of the money actually due, discharges her and releases her property from the lien of the mortgage.

Whether the facts proven in this case would constitute such a contract may admit of some doubt.

The execution by the principal debtor and the acceptance by the creditor of a note payable at a future day for and on account of the debt, would seem to be *prima facie* a contract to extend the time of payment. 2 *Am. Leading Cases*, 420, and cases there cited.

But as this case must be decided against the plaintiff on another ground, we do not deem it necessary here to decide this question.

The obligation not to give time to the principal depends upon a knowledge of the real character in which the surety entered into the contract.

If, therefore, the fact of the suretyship does not appear on the face of the contract, the surety will not be discharged from liability in consequence of a variation of the contract, if the creditor, at the time of the act complained of, had not notice that the relation of suretyship existed; and such notice is not presumed in favor of the surety, but must be proven. *Gahn vs. Niemcewicz*, 3 *Paige*, 650; 11 *Wend.*, 323; *Wilson vs. Foot*, 11 *Metcalf*, 285; 2 *Am. Lead. Cases*, 411, and cases cited; 3 *Lead. Cases in Eq.*, 546, and cases cited.

In this case there is neither allegation nor proof of such notice on part of the defendants or their assignor.

The judgment of the Court below is affirmed.

***STATE OF MINNESOTA VS. HENRY MILLER.**

A new trial is grantable at the instance of the accused in all criminal cases when the evidence was *manifestly* insufficient to warrant the finding of the jury.

The defendant was tried before a Justice of the Peace of Nicollet County for petit larceny, and found guilty. He appealed from the judgment of the Justice to the Nicollet County District Court. Upon a trial in said Court before a jury, the evidence on the part of the prosecution was: That one Long was the owner of a pair of bob sleds, which he took to a shop to have repaired; that sometime from the middle of November to the first of December the repairs were completed and the sled placed outside the shop; that four or five days afterwards it was noticed that one of the sleds was gone; that on or about the 24th of December following the lost sled was found in the yard of defendant near his house.

Defendant produced a witness who testified that sometime from the middle to the last of November in the same year he and Miller were going for loads of firewood, when they met a man who then sold this sled to Miller for \$10, and that he afterwards the same day saw the sled delivered and the money paid. He produced two other witnesses who testified that they saw Miller pay over to a man in his house \$10, the purchase money for the sled. He also produced a witness who testified that he had known Miller for six years, and that his general reputation for honesty was good.

The jury found the defendant guilty. Defendant moved the Court for a new trial, and in arrest of judgment, which motion

*This case was heard and submitted before Mr. Justice Berry took his seat on the Bench.

was denied, and he was sentenced to pay a fine of \$25 and be imprisoned thirty days. Defendant sued out a writ of error and removed the case to this Court.

COX & GRIFFIN for Plaintiff in Error.

I.—Innocence is presumed until guilt is proven, and when possession of stolen property is relied upon for conviction, possession must be fully proved. 3 *Green. on Ev.*, sec. 29, note 5; *Id.*, sec. 31. And it must be exclusive. *Id.*, sec. 33. And if there are other inmates of the house capable of the larceny, the evidence is insufficient. 2 *Starkie on Ev.*, 840; *Barb. Cr. L.*, 184–5, *ante cited*; 2 *Arch.*, 369, 3 note.

If the article stolen is one of ordinary traffic and commerce, the time between the larceny and the finding must necessarily be very limited. 2 *Arch.*, 369, 2 note and *ante*, 370, 1 note (2); 2 *Russ. on C.*, 124, *marg*; 3 *Green. on Ev.*, sec. 32.

II.—This case on the part of prosecution is one of presumption. The defence rebuts, by testimony unimpeached, felonious possession, and gives a reasonable account of such possession. Prosecution must show it to be false. 3 *Greenl. on Ev.*, sec. 32 and notes.

Possession need not be proven by positive testimony by defence. 2 *Arch.*, 369, 5 note (1). Testimony of one creditable witness is sufficient. 1 *Starkie on Ev.*, 485.

Good character removes presumption of guilt raised by possession of stolen property. *Barb. Cr. L.*, 185 and *ante*; 2 *Arch.*, 369–4 and note.

G. E. COLE for Defendant in Error.

Where there is any evidence in support of the verdict, it has been repeatedly determined that this Court will not disturb it. *Davis vs. Smith*, 7 *Minn.*, 414.

The fact of the possession of the property by the defendant one month after its loss, was not only *some* evidence, but, unexplained,

was conclusive. Whether that possession was satisfactorily accounted for is for the jury to determine in the light of the intrinsic probability of the story, and the appearance and conduct of the witnesses upon the stand. The rule suggested, that when a person in whose possession stolen property is found, gives a reasonable explanation of his possession, it is incumbent upon the prosecution to show the falsity of defendant's account,—has reference to the burden of proof merely; whether the account is reasonable or true, still remain questions for the jury, and upon which their verdict should be conclusive.

By the Court—WILSON, C. J.—It was the ancient common law rule that a defendant convicted of *felony* could not for any cause have a new trial; the sole remedy being to apply for a pardon if for any cause the conviction was improper. 1 *Chitty's Cr. Law*, 644, and cases there cited.

But in *misdemeanors* it was different. *Rex vs. Maubey*, 6 T. R., 638. This common law rule is not the law with us.

In most if not all of the United States new trials are grantable at the instance of the accused in *all* criminal cases. 1 *Arch. Cr. Prac. and Plead.*, (7th Ed.,) 663, note and cases there cited; 2 *Lead. Crim. Cases*, 491-2, in note and cases there cited.

This practice we think based on sound principle and consonant to the dictates of justice and humanity. See *People vs. Stone*, 5 Wend., 42.

It is true that the crime charged in this case is not a felony, and the punishment consequent on conviction is usually considered light, but this does not at all affect the principle involved.

The rights of the citizen—the claims of justice, are to be taken into the account in granting a new trial—not the amount of the fine or length of imprisonment. The person who is unjustly convicted of the larceny of one dollar has sustained an irreparable injury. The blot on his reputation is an injury that can never be atoned for or remedied. It does not die with him, but is an inheritable curse which he transmits to his posterity.

That the evidence was insufficient to justify the verdict, is a

ground on which a new trial is often and properly granted. *See 1 Arch. Cr. Prac. and Plead., (7 Ed.,) 663, and cases cited in notes.*

We admit that to warrant a new trial in such cases, the evidence must be manifestly insufficient to warrant the finding of the jury, and this reasoning applies *a fortiori* to an appellate court. *See authorities last above cited.*

In this case the evidence of the guilt is the possession by the accused of the stolen property about a month after it was stolen. This perhaps was sufficient to call on him for an explanation of his possession.

This explanation he gave by the testimony of three witnesses that he purchased the stolen property—giving the time and place of purchase and the amount paid.

He also called a witness who testified that his reputation for honesty was good. How the jury with this evidence before them uncontradicted could find a verdict of guilty, is only to be accounted for by supposing that they forgot the humane maxim of the criminal law, that it is sufficient for the prisoner to raise a reasonable doubt of his guilt.

The verdict is manifestly against the weight of evidence.

New trial granted.

FOSTER L. STEVENS vs. JAMES W. CURREY et al.

Where a cause is regularly noticed and placed upon the calendar for trial, an amendment of the pleadings does not render a new notice of trial necessary.

This cause was at issue, and noticed for trial by the plaintiff's attorneys, and placed on the calendar for the term of the District Court in Olmstead county, in October, 1862. At said term, the

plaintiff moved for leave to amend his complaint, which was allowed, and the complaint was amended. There was also an amended answer and reply in said cause. No notice of trial, other than the one for said October term, was ever served. The cause was on the calendar of said court for the May term, 1863, and the defendants moved the court to strike the same from the calendar, as improperly placed thereon. The motion was denied: and the cause moved on for trial by the plaintiff, and the defendant being called, failed to appear, and the cause was tried by the Court, and a decision rendered in favor of the plaintiff.

Judgment was entered upon the decision, and the defendants appeal from such judgment, and from the order of the court refusing to strike the cause from the calendar of the May term of the District Court.

CHAS. C. WILLSON for Appellants.

I.—The Compiled Statutes, *p.* 558, *sec.* 8, provide that at any time after issue, either party may give notice of trial—the issues once placed upon the calendar of a term, if not tried at the term for which the notice was given, need not be noticed for a subsequent term, but must remain upon the calendar from court to court until finally disposed of.

The party giving the notice must furnish the clerk with a note of the issue, stating the date when the last pleading was served—and the clerk must thereupon enter the cause upon the calendar according to the date of the issue.

Under this statute it is to be observed that it is the issue not the cause that is placed on the calendar for trial. The old issue noticed and placed on the calendar bore date September 6th, 1862, and was disposed of at the October Term, 1862, by being set aside and vacated by the operation and effect of the order entered by consent at that term. The new issue bore date April 20th, 1863.

II.—If no new notice of trial was required in this case, then the issue remained on the calendar for trial, and could have been
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brought to trial at any term held in the county before the new pleadings were served.

That position involves this absurdity, that the old issue was the one tried and that the new pleadings do not form the issues in the case.

III.—If no new notice of trial was required in this case then no new note of issue was required, and the issues would stand on the calendar six months higher up than their proper place, viz: at the date of the old issue and not as of the time the last pleading was served.

IV.—It is too evident to admit of argument that these defendants have had no day in court—no opportunity to prove their defence in this case, that judgment was given against them without notice, and that a new trial should be granted with costs.

TOLBERT & SWEAT for Respondent.

I.—The cause was properly put on the calendar at October Term, 1862, and being properly on the calendar must remain there until disposed of.

II.—At any time after issue either party may give notice of trial—the issues once placed upon the calendar of a term if not tried at the term for which the notice was given, need not be noticed for a subsequent term, but must remain upon the calendar from court to court until finally disposed of. *Comp. Stat., page 558, Sec. 8.*

By the Court—**McMILLAN, J.**—The only question to be determined in this case is whether after a cause is regularly noticed for trial and placed upon the calendar, an amendment of the pleadings requires a new notice of trial before the case can be disposed of if either party objects.

It is expressly provided by statute when the proper notice of trial and note of issue are given, that the clerk shall enter the cause upon the calendar according to the date of the issue, and “The issues once placed upon the calendar of a term if not tried at the term for which the notice was given, need not be noticed

for a subsequent term, but must remain on the calendar from court to court until finally disposed of." * * * *Comp. Stat., Ch. 61, Sec. 8, page 558.*

Amendments of pleadings both before and upon the trial of causes are of common occurrence. If the position of the appellant is correct, no cause could be tried where an amendment of the pleadings takes place until a subsequent term, and until new notice of trial is given. An amendment of pleadings is not a final disposition, although it may be a change of the issues in an action, and does not under our statute require a new notice of trial. We see no error in the proceedings of the Court below.

Judgment affirmed.

CASPER H. SCHURMEIER vs. GUSTAF JOHNSON et al.

At the proper time on the trial in the Court below, the plaintiff's counsel submitted to the Court five distinct propositions or requests—*separately numbered*, and asked the Court to charge the jury as therein requested. The Court took up the propositions and ruled upon them *separately*, denying or modifying each. The plaintiff's counsel "excepted to said refusals and modifications and to said instructions as given." *Held*—that this exception applied to the ruling of the Court in *each* proposition, and was therefore sufficiently specific.

As a general rule a verdict does not operate as an estoppel until it has received the sanction of the Court and has passed into a judgment.

In the absence of fraud or mistake, parol evidence is inadmissible at law or in equity to vary a written contract.

This action was commenced in the District Court of Ramsey County. The complaint sets out, with the usual averments, a cause of action upon four promissory notes executed by the defendants and one Anderson (since deceased) to the plaintiff, bearing date November 15, 1856, each for \$695 with interest, and

becoming due in one, two, three and four years respectively.

The defendants set up two defences:

1. That the defendants and said Anderson entered into a parol contract with the plaintiff for the purchase of certain lands, by the terms of which plaintiff was to subdivide the same into thirteen acre tracts, and execute a bond to each of defendants and said Anderson for one of those tracts, and take the several notes of each for the unpaid purchase money; that afterwards the plaintiff presented joint notes for the said purchase money for them to execute, and a joint bond to all the purchasers for the whole tract, and requested them to execute the notes and hold the bond as *security merely*, and in the following spring he would have said lands surveyed and carry out the original contract; that relying upon the said promise of plaintiff, and in consideration thereof, the said purchasers paid on account of their several purchases about \$644.50, executed the notes (those in suit), and received the bond as *security* as aforesaid; that defendants were always ready to perform said original contract, but plaintiff has neglected and refused (though often requested) to perform the same on his part.

2. That a suit was commenced by one of defendants (the other purchasers transferring their interest in the matter to him) against said plaintiff, to recover back the purchase money paid and cancel said notes, in which plaintiff appeared, and upon the trial had therein, verdict was rendered by a jury in favor of said defendant, (the plaintiff in said action); that the matters determined in said suit are the same that plaintiff seeks to litigate in this.

The plaintiff by his reply puts in issue the first defence. The action came on for trial at the October term, 1863; evidence was introduced on the part of the defendants tending to prove, among other things, the parol contract set out as matter of defence; at the close of the testimony the plaintiff, by his counsel, submitted *five* distinct propositions, separately numbered, and asked the Court to charge in accordance therewith. The fifth proposition is as follows: "No verbal understanding or agreement made prior to or contemporaneous with the execution of these notes can be considered by the jury, for the purpose of varying or contradict-

ing the terms of these notes." The Court ruled upon each proposition, denying or modifying each,—upon the fifth as follows: "This is correct as a general rule, but is not applicable to the case if the jury find that the notes in suit were only delivered as security for the performance of the verbal contract as alleged by the defendants." Thereupon the plaintiff's counsel excepted "to the said refusals and modifications, and to said instructions as given." The jury returned a verdict for the defendants. The plaintiff moved the Court for a new trial, which motion was denied, and from the order denying the same the plaintiff appeals to this Court.

LORENZO ALLIS for Appellant.

BRISBIN & WARNER for Respondents.

By the Court—WILSON, C. J.—At the proper time on the trial below the plaintiff's counsel submitted to the Court five distinct propositions or requests—separately numbered—and asked the Court to charge the jury as therein requested.

The Court took up these propositions and ruled upon them separately—denying or modifying each. The plaintiff's counsel "excepted to said refusals and modifications and to said instructions as given." As a preliminary question it is insisted that this exception is not sufficiently specific to be available to the plaintiff, and therefore that the correctness of the charge is not a question properly before the Court. It is doubtless incumbent on him who excepts to the ruling or charge of a Court, to unmistakably point out the error complained of so that if committed inadvertently it may be corrected—nothing more than this can be required—and this we think was done in this case. The plaintiff's counsel submitted to the Court several distinct legal propositions, the Court passed upon them separately, and the exception must be understood as applying to the ruling of the Court on *each* proposition. This is the fair import and meaning of the language used. *See* 1 *N. Y. Practice*, (*Tif. & S.*) 582-3; *Dunkel vs. Wiles*, 11 *N. Y.*,

(1 *Ker.*,) 420; *Willard vs. Warren*, 17 *Wend.*, 259; *Merritt vs. Seaman*, 6 *N. Y.*, (2 *Seld.*,) 175; *Jones vs. Osgood, Id.*, 234.

The defendants claim that there has been a former adjudication of the subject matter of this action, but they fail to sufficiently plead such former adjudication in their answer. A verdict in such case does not operate as an estoppel until it has received the sanction of the Court, and has passed into a judgment. 2 *Smith's Leading Cases*, 687; *Donaldson vs. Jude*, 2 *Bibb.*, 60; 1 *Greenleaf's Ev.*, Sec. 510; 1 *Starkie's Ev.*, 297; *Shaeffer vs. Kreitzer*, 6 *Bin.*, 430.

We now come to the consideration of the charge of the Court. The fifth proposition or request submitted by the plaintiff's counsel was in the following language:

"No verbal understandings or agreements made prior to or contemporaneous with the execution of these notes, can be considered by the jury for the purpose of varying or contradicting the terms of these notes." The Court in refusing to charge as thus requested said, "This is correct as a general rule, but is not applicable to this case, if the jury find that the notes in suit were only delivered as security for the performance of the verbal contract as alleged by the defendants."

It is a rule well settled that in the absence of fraud or mistake, parol evidence is inadmissible at law or in equity to vary a written contract—such contract can not be varied, explained away or rendered ineffectual by parol proof of any conversation or stipulation prior to or contemporaneous with its execution. It is conclusively presumed to set forth the whole agreement of the parties, and the extent and manner of their agreement. *Parkhurst vs. Van Cortlandt*, 1 *John. Ch.*, 282; 1 *Greenleaf's Ev.*, Sec. 275.

The Court below while it recognized the correctness of this general rule, seemed to think it inapplicable in this case; but this has been otherwise and we think correctly decided in a case between these parties involving this very question. See *Russell vs. Schurmeier*, 9 *Minn.*, 28. It is true that fraud vitiates and renders null a contract, and that parol evidence may be received to show the existence of such fraud; but in this case the charge ex-

cepted to was given unqualifiedly and without any reference to the question of fraud, and it is not pretended that there was any surprise or mistake as to the terms of the notes or bond.

This point is decisive of the case and renders unnecessary any further examination of the charge.

The order appealed from is reversed and new trial ordered.

***DANIEL A. ROBERTSON, Sheriff of Ramsey County, vs. HENRY H. SIBLEY.**

R. sues as sheriff, by virtue of a levy upon the unpaid amount of subscription of S., the defendant, to the stock of the M. & C. V. R. R. Co., under an execution upon a judgment in favor of McD., G. & Co. against said R. R. Co. *Held*—that the right of action depends entirely upon *sec. 109, chap. 61 of the Pub. Stat.*

The M. & C. V. R. R. Co. was incorporated by the Territorial Legislature by special act, approved March 1, 1856. It does not, therefore, come within the provisions of the State Constitution relating to corporations.

The act of incorporation contains no provision making the stockholders individually liable to any extent for the debts of the Company, nor are the provisions of the public statutes *pp. 330-1, secs. 221-2*, applicable; the liability of the defendant as a stockholder, therefore, is unaffected by statutory provision.

Assuming for the purposes of this action that *subdivision 3, sec. 148, Pub. Stat.*, embraces demands of a legal and equitable character; *Held*—that the rights and liabilities of the parties to the *debt levied on*, must characterize it as a legal or equitable claim, and that the sheriff can avail himself only of equities existing between such parties, and not of such as may exist in favor of the judgment creditor against any of such parties; the plaintiff, therefore, in this case can have no greater rights against the stockholder than the Railroad Company has.

The complaint alleges that the defendant, after the organization of the Company, duly subscribed for and thereby agreed to pay to said Railroad Company two hundred and fifty shares of one hundred dollars each of the capital stock of

* Mr. Justice Berry being of counsel in this cause, took no part in its hearing and decision.

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said Company, but has not paid to exceed five per cent. thereof. The charter provides that the directors may require and receive payment of the subscription to the capital stock at such time and in such proportion, not exceeding ten per cent. at any one installment, as they shall see fit, and may declare said stock forfeited and all payments thereon, or otherwise, on a failure to make payment as required, provided they shall first give thirty days notice of such requisition. *Held*—that the subscription pleaded must be taken as a naked subscription for stock showing no express promise to pay, and as between the stockholders and the company the terms of the charter regulating the subscription for stock must be considered as entering into the contract between the stockholder and the company.

The terms of the subscription must be the measure of the defendant's liability to the Company, and unless by these terms the debt is recoverable, no action can be maintained by the Company.

The complaint does not allege a call for any installment or for any amount, either upon the whole stock or the defendant individually, but avers that no call has been made; nor does it allege any default except that "the defendant has not paid to exceed five per cent. of the amount of stock subscribed by him." *Held*—that this state of facts does not show a breach of the contract by the defendant upon which the Company could maintain an action against him.

The complaint alleges the insolvency of the Company, its refusal to call for installments of stock subscription, or make provision for the payment of its debts; the total abandonment of the work for which it was created, and of its own organization since some time in 1859. *Held*—That whatever might be the effect of these facts in a proceeding in equity by a creditor against the corporation and its stockholders, they constitute no ground of action by the Company against a stockholder, but the reverse, and as the sheriff, the plaintiff in this action, has no greater rights than the Company, do not constitute a ground of action in him.

This action was commenced in the Ramsey County District Court. The allegations of the complaint which are material to the points decided are: that on the 9th day of February, 1864, a writ of execution duly issued out of said Court upon a judgment recovered therein by McDonald, Graham & Co., against The Minneapolis and Cedar Valley Railroad Company, and was directed and delivered to plaintiff, who then was and now is Sheriff of said county; that at the time of the recovery of said judgment, defendant was, ever since has been and now is a stockholder in

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said company; that after the organization of said R. R. Company, defendant duly subscribed for and thereby agreed to pay to said R. R. Company, 250 shares of \$100 each of the capital stock of said company, but has not paid to exceed 5 per cent. of such subscription, and is now indebted to said R. R. Company on account of such stock subscription in the sum of \$23,750; that in 1859, said R. R. Co. became insolvent, and unable to pay its liabilities, except by requiring payment of the capital stock subscribed; that said R. R. Co. has neglected and refused to call for or require the payment of such stock subscriptions, or make provision for the payment of its liabilities; that since sometime in 1859, said R. R. Co. has not prosecuted or made any effort to prosecute the work for which it was incorporated, but has abandoned the same, and has not kept up its organization, nor transacted any business; that on the 9th day of February, 1864, plaintiff as such Sheriff, by virtue of such execution, duly levied upon the said indebtedness of said defendant to said R. R. Co.; that defendant neglects and refuses to pay said indebtedness to plaintiff, though often requested. The defendant demurred to said complaint upon the ground: that the plaintiff had no legal capacity to sue, and that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was sustained by the Court below. The plaintiffs appeal from the order sustaining the same to this Court.

SMITH & GILMAN for Appellant.

The appellant refers to the following authorities in support of his right to maintain the action, as set forth in the complaint: *Comp. Stat.*, page 551, *Sec. 148, subdivision 3*, and page 553, *subdivision 4 of Sec. 156*; *Henry vs. Vermillion and Ashland R. R. Co.*, 17 *Ohio*, 187; *Miers et al. vs. Zanesville and M. Turnpike Co.*, 11 *Ohio*, 273, and 13 *Ohio*, 197.

LORENZO ALLIS for Respondent.

I.—The Sheriff has no legal capacity to bring this action:
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1. Because he has not perfected the levy as required by statute. In such case it should appear that the provisions of statute, *Sec. 139, subdivision 3 and 4, Sec. 142, Comp. Stat., pages 551-2*, have been complied with. Otherwise *Sec. 143, Comp. Stat., page 552*, is not applicable. *Sec. 21, page 196, Rev. Stat.*

2. Because the latter statute manifestly applies to the mere collection of a liquidated debt, by ordinary process of law. It cannot be applicable to a case like the one at bar, where the equitable powers of the Court must necessarily be invoked and used, and where such powers are alone available to attain the object or end aimed at.

II.—The franchises and organization of the company long ago ceased by non-usor, and were moreover entirely forfeited, and the existence of the company ceased and its civil death was duly declared. *See allegations of the complaint; Session Laws, 1856, page 325; Id., 1857, page 20, Sec. 6, et seq.; Id., 1858, page 491; Id., 1861, page 213; Id., 1862, 227; Id., 1863, 137; Id., 1864, page 164.*

To render subscription to capital stock a binding contract at all for any purpose, there must of course be mutuality, as in any other contract. If there is a failure on the one side or the other, there is of course to that extent, failure of consideration, and the other side is therefore released from performance on his part, as in other contracts.

In the case at bar it is therefore clear that the defendant's obligation or debt on his subscription ceased on the disorganization of the company and the forfeiture of its franchises, which was long before the commencement of this action.

If the company could not maintain an action for this subscription against the defendant, then the plaintiff cannot; for the plaintiff can have no greater rights in the premises, than the company. Whatever rights the plaintiff has, if any, are obtained by a sort of legal or statutory subrogation to those possessed by the company. He stands at best only in the company's shoes, in this action.

It is clear that the company could have no claims whatever against the defendant on his subscription when this action was

commenced, nor since the disorganization and dissolution of the company—since it ceased to exercise its function and lost its franchises. *Angell & Ames on Corporations*, page 478, Sec. 4; page 159, Sec. 2; pages 160, 736, Sec. 4; page 741, Sec. 5; page 750, Sec. 6.

Sections 16 and 17 of the original act of incorporation of 1856, sufficiently reserve the powers exercised by the Legislature by the acts of 1861–2–3, if any such reservation was necessary. But the non-usor of its franchises and the abandonment of its organization by the company and its relinquishment of the objects for which it was created, as long ago as 1859, furnished a sufficient justification to the Legislature for the acts of 1861–2–3.

And moreover as nothing appears to the contrary, it must be presumed that the company has acquiesced in these acts of the Legislature, which acquiescence would of itself be tantamount to the voluntary surrender of its franchises.

But the abandonment by the company of its organization and the objects for which it was created as alleged in the complaint, is of itself equivalent to a surrender of its rights and franchises; it being a well established principle, that whenever a corporation does or suffers to be done, acts which destroy the end and object for which it was instituted, it thereby surrenders its rights. *Bradt vs. Benedict*, 17 N. Y., page 96 and 99.

By the Court—McMILLAN, J.—This action is brought under *Subdivision 4, Sec. 156, of the Pub. Stat.*, page 553, to recover the unpaid amount of subscription of the defendant to the stock of the Minneapolis and Cedar Valley Railroad Company, the judgment debtor. The plaintiff sues as Sheriff by virtue of a levy upon the said indebtedness of the defendant, Sibley, to the Railroad Company, under an execution upon a judgment in favor of McDonald, Graham & Co., against the said Minneapolis and Cedar Valley Railroad Company. His right of action must depend, therefore, entirely upon the statute authorizing him to collect debts thus levied upon. *Pub. Stat., Chap. 61, Sec. 109, page 572.*

The Minneapolis and Cedar Valley Railroad Company was incorporated during our Territorial existence, by special act of the Legislature approved March 1, 1856, and does not, therefore, come within the provisions of the State Constitution relating to corporations, nor is there in the act of incorporation any provision making the stockholders individually liable to any extent for the debts of the company. It is not claimed that the general provisions of statute relating to corporations (*Pub. Stat.*, pages 330-1-2-3, *Secs.* 321-2,) affect this case, nor do we deem these provisions applicable in this instance. *Gebhart vs. Eastman & Gibson*, 7 *Minn.*, 60. The liability of the defendant, therefore, as a stockholder in the corporation is unaffected by statutory provision.

Assuming, for the purposes of this case, that the statute authorizing the attachment and levy of debts due to a judgment debtor—*Pub. Stat.*, subdivision 3, *Sec.* 148, page 551—embraces demands both of a legal and equitable character, it is evident that the rights and liabilities of the parties to the debt levied on, must characterize it as a legal or equitable claim, and that the Sheriff can avail himself only of equities existing between such parties, and not of such as may exist in favor of the judgment creditor against any or all of such parties. Therefore, the plaintiff in this case can have no greater rights against the stockholder than the company has. Excluding then any equities peculiar to a creditor of a corporation, which under other circumstances might be recognized, let us consider the liability of the stockholders to the company.

The allegation in the complaint is that the defendant, Sibley, after the organization of the company duly subscribed for and agreed thereby to pay to said Railroad Company, 250 shares of \$100 each of the capital stock of said company, but has not paid to exceed five per cent. thereof.

The charter provides that "the directors may require and receive payment of the subscriptions to the capital stock at such time and in such proportion, not exceeding ten per cent., at any one installment under such conditions as they shall see fit, and may

declare said stock forfeited, and all payments thereon, or otherwise, on a failure to make payment as required, provided they shall first give thirty days' notice of such requisition."

The subscription thus pleaded must be taken as a naked subscription for stock, showing no *express* promise to pay, and as between the stockholder and the company, the terms of the charter regulating the subscriptions for stock, must be considered as entering into the contract between the stockholder and the company.

Whether on a simple subscription for stock, the company can maintain an action at law, has been variously decided, and the authorities differ widely; as the question was not discussed in this case, and but two of the members of the Court take part in this decision, we refrain from deciding the point, but assuming that an action will lie in favor of the company against the stockholder upon an implied promise, still the terms of the subscription must be the measure of the defendant's liability, and, unless by these terms the debt is recoverable, no action can be maintained by the company.

The terms of this contract on the part of the stockholders are, to pay the amount when called by the company, in installments not exceeding ten per cent. each, upon thirty days' notice. Here are three conditions or qualifications of the promise; first, a call by the company, and this not a call upon an individual stockholder, but upon the whole stock of the corporation; second, for an amount not exceeding ten per cent. of the stock; third, thirty days' notice.

The complaint does not allege a call for any installment or for any amount, either upon the whole stock or the defendant individually, but avers that no call has been made; nor does it allege any default except that "the defendant has not paid to exceed five per cent. of the amount of stock subscribed for by him."

We are unable to see, in this state of facts, any breach of the contract on the part of the defendant, upon which *the* company can maintain an action against him.

The complaint seeks to avoid this difficulty by alleging the insolvency of the company, its refusal to call for installments of

stock subscriptions, or make provision for the payment of its debts; the total abandonment of the work for which it was created, and of its own organization since some time in 1859.

We do not think these circumstances affect the rights of the parties in this action. In a direct proceeding in equity, by a creditor against a corporation and its stockholders, invoking a court of chancery to subject the unpaid stock of a corporation to the liquidation of its liabilities, the creditor might perhaps avail himself of these facts as a ground of equitable relief. But the plaintiff—the Sheriff—in this action, as we have before endeavored to show, has no other rights in this matter than such as pertain to the company as against a stockholder, and in such case, we think, it cannot be claimed that the facts pleaded strengthen the claim of the company to recover for a breach of the contract of subscription to its stock; on the other hand they go directly to defeat such claim.

Whatever view may be taken of the doctrine laid down by the Supreme Court of Ohio in the cases cited by the counsel for the appellant, an examination of the cases we think will show that they do not sustain the position taken by the appellant in this case. These were all proceedings in chancery under a special statutory provision, (*Swan's Stat.*, 704, *sec. 16, Ed. 1841*), brought by *judgment creditors*, after return of *nulla bona*, directly against the corporation and certain delinquent stockholders. In these cases the creditors, although they came into a court of chancery under statutory provisions, brought with them all their equities not only against the corporation, but the stockholders, and these could all be recognized and enforced. In this case the creditor himself does not come into court, but the sheriff comes, bringing, not the equities which would attach to the creditor in a direct proceeding against all the stockholders, but if anything more than a legal title, strictly statutory, to a debt, certainly only such equities as exist between the original parties to the claim levied on.

A single instance will illustrate the vital difference between the cases cited by the appellant's counsel and the case at bar. The Supreme Court of Ohio says: "When a company as in this case

becoming insolvent, abandon all action under their charter, the original mode of making calls upon the stockholders cannot be pursued. The debt, therefore, from that time must be treated as due without further demand." *Henry et al. vs. Vermillion and Ashland R. R. Co. et al.*, 17 *Ohio R.*, 187.

This may be true in equity in an action by the creditor against the company and stockholders, in which it was enunciated, but the same rule will not apply in an action by the company against a stockholder on his stock subscription, since such a state of facts throws the whole default upon the company.

We are of opinion, therefore, that the complaint does not state facts sufficient to constitute a cause of action. The order sustaining the demurrer should be affirmed.

*GERMAN LAND ASSOCIATION VS. KONSTANTINE SCHOLLER.

The German Land Association, being a mere voluntary association of persons unincorporated, has no legal capacity to take or hold real property; nor can such Association be the beneficiary of a trust. A deed, therefore, to A, B & C, in trust for such Association, is void.

The complaint in this action states that on and before the 30th of July, 1856, there was an Association composed of several hundred persons, organized under a certain constitution for the purpose of acquiring homesteads for the several members thereof upon the public lands in one of the Northwestern States or Territories, &c., with a prospect of final incorporation for such purpose, &c., and that such Association was known as the German Land Association of Minnesota; that the same was on the 4th of March, 1857, duly incorporated under said name or title, and is

*This cause was heard and submitted before Mr. Justice Berry took his seat on the Bench.

the plaintiff in this action; that the defendant Konstantine Scholler, on the 30th of July, 1856, (prior to the act of incorporation), was seized and possessed of the entire equitable interest and estate in certain lands in Brown county, Minn.,—the mere legal title being in the United States,—and did for a valuable consideration paid to him by said Association, execute, acknowledge and deliver a conveyance of said land to *Albert Tofel, Louis Strobel and Louis Hoffman, who were then Trustees of said Association, in trust for said Association, and for the several use and benefit of the several members thereof according to their respective interests, as the same might thereafter be determined by division or otherwise*; that said defendant in such conveyance covenanted and agreed that when he should receive a patent for said lands, he would hold and stand seized of the title thereof for the use of and in trust for said Trustees, and not otherwise; and would upon demand execute, acknowledge and deliver to said Trustees, as such, a good and sufficient deed of conveyance of the title of said land in fee, free from all incumbrances, in trust for the uses and purposes expressed in the conveyance to said Trustees. The deed was dated July 30th, 1856, and was recorded in Brown county on the 25th of February, 1858. The said Trustees, by a deed dated September 14, 1857, duly executed and acknowledged, conveyed said lands in fee simple to the Association, (the plaintiff,) and the plaintiff became seized and possessed of the entire equitable interest and estate in said lands, subject only to the uses and purposes expressed in the first mentioned deed—the mere legal title still then remaining in the United States. The deed was recorded in Brown county on the 12th of February, 1858. Letters patent bearing date June 1st, 1859, were issued to the defendant for said lands, and were recorded in Brown county on the 28th June, 1861. The plaintiff has subdivided said lands into lots and outlots, and has executed conveyances with special warranties of the larger portion of the lands to the several members of the Association, according to their respective interests, and a portion of the lands, viz: Lot 88, according to the new plat of New Ulm, has been conveyed by the plaintiff to the de-

fendant. The plaintiff is still in possession and occupancy of a small portion of the land for the benefit of its members. After the patent was issued, and before the commencement of this action, the plaintiff has repeatedly demanded of the defendant that he execute a deed of said lands (except said lot, No. 88,) to the plaintiff, which he has refused and still does refuse to do, claiming that he holds the lands for his own use and benefit, &c. * *

That by reason of the premises the plaintiff has become liable to respond in damages to the respective grantees of the lands in the several conveyances executed by the plaintiff, and a cloud is cast upon plaintiff's bona fide title, preventing the plaintiff from giving clear title to the remaining portion of the lands to the members of the Association entitled thereto. That plaintiff is in possession of said lands, and that the defendant claims an estate or interest therein adverse to this plaintiff.

Wherefore the plaintiff prays judgment that the defendant may be adjudged to convey the lands (except said lot, No. 88,) to plaintiff, free and clear of all incumbrances, and plaintiff's title to the land confirmed and established as against the defendant, and all persons claiming under or through him, &c.

The defendant interposed a general demurrer, that "The complaint does not state facts sufficient to constitute a cause of action." The demurrer was duly brought on for argument, and a decision rendered thereon as follows :

"The demurrer to the complaint herein is well taken, and should be sustained for three reasons: First, because the 'German Land Association of Minnesota,' was not at the time of the conveyance of the land in question, a *person* in the law capable of receiving a conveyance of lands, and could acquire no equitable interest in the lands by virtue of the deed of trust mentioned in the complaint, and of the subsequent conveyance by the trustees.

"Second, but if said Association had been a *person* in the law capable of holding lands by deed or otherwise, then no trust was created by the trust deed, for the same is not fully expressed and clearly defined upon the face of the instrument as provided in Sec. 11, pages 382-3 of *Comp. Stat. of Minnesota*.

"Third, there are not sufficient allegations in the complaint showing that the plaintiff therein succeeded to the rights, &c., of the 'German Land Association of Minnesota.'

"The demurrer to the complaint herein is hereby sustained," &c., and from the order sustaining the same the plaintiff appeals to this Court.

H. R. BIGELOW and GREENLEAF CLARK for Appellant.

I.—The German Land Association of Minnesota at the date of the respondent's deed, (July 30th, 1856,) was competent to purchase and hold real estate. Whether the title acquired by purchase would vest in the members of the Association as tenants in common, or in their associate capacity it is not necessary to discuss; but that a conveyance to the Association would not pass the title from the grantor, can hardly be seriously contended. Under our laws, not only adult citizens, but infants, married women, aliens, partnerships, and all corporations and other business associations, not under some special statutory disability, may purchase and hold real estate to any extent.

The conveyance then by the defendant passed his interest in the property at the date of the deed—his covenants to stand seized, &c., and to make a further conveyance when he should receive the legal title from the Government, became equally binding upon him at the time they were made.

II.—The trust created by the defendant's conveyance, as alleged in the complaint, was a valid trust. *Bouv. Law Dic.*, page 216.

Our statutes on the subject of uses and trusts have no application to and cannot affect conveyances pertaining to United States Government lands, made after the entry of the lands and before the issuance of the patent therefor by the Government. *Irwin vs. Marshall & Barton*, 20 *How. U. S. Rep.*, 558.

III.—Admitting that our statutes apply in this case, and that under them no trust was created by the deed, *i. e.*, that no title was thereby vested in the trustees, the conveyance is not void; but the effect in such case is to vest the title in the *cestui que trust*,

the Association, or the members of the Association. *Comp. Stat.*, 282, 283 and 284.

But the case does not show that the trust was not "fully expressed and clearly defined" in the deed; and we submit, as a question of pleading, that if it was not, the defendant can only avail himself of the fact by pleading it in answer to the complaint. Under the complaint as it now stands evidence of a valid deed of trust is admissible. Hence a demurrer cannot reach the point.

IV.—The said Association became a corporation by act of the Legislature, approved March 11, 1857. *Session Laws of 1857*, page 147, &c., and that corporation is the plaintiff.

The deed from the trustees to the plaintiff with the assent and by the direction of the *cestui que trust* and *cestui que use*, (if the point that our local statutes do not apply is well taken,) clearly vests in the corporation such right and title as the defendant passed by his deed to the trustees. *Bouv. Law Dic.*, page 216. And even if our statutes can apply, the acts of the members of the Association as alleged, and the deed of the trustees are tantamount to a conveyance from all, and must operate to vest the plaintiff with all the right and title passed by the previous deed of the defendant, and must be sufficient to authorize the plaintiff to demand of the defendant, and enforce the performance of the covenants contained in that deed.

V.—If the plaintiff has become possessed of the right and title of the purchasers, under the defendant's deed and covenants, then, clearly, the contingency having arisen in which by his covenants the defendant bound himself to make a further conveyance, and that conveyance having been demanded by the plaintiff and refused, the plaintiff's case is fully established.

D. S. GRIFFEN and E. ST. JULIEN Cox for Respondent.

I.—The German Land Association of Minnesota at the date (July 30th, 1856,) of defendant's pretended trust deed, was not a person or corporation known in the law that it could be a legal grantee or *cestui que trust*, nor could it through its trustees be a

grantor, and as it was neither, there was no person in the law for the trustees to purchase or hold said land for, and the said deed is void. *Sloan vs. McConaly*, 4 (*Ohio*,) *Hammond R.*, 157; *Jackson vs. Cory*, 8 *J. R.*, 301; *Hourbeck vs. Westbrook*, 9 *J. R.*, 73; *Dart's Vendors, &c.*, page 8*.

And there being no person or persons named as grantee in said deed, and if any title passed under it from defendant it went into the several hundred natural persons who made up the old "Association," who hold it as joint tenants, and nothing but a deed can bring it out of them; and as the complaint does not show a deed from them, plaintiff has no interest in the land to sustain an action on. The complaint does not show that said trust deed passed any title from defendant, as it does not show there was any legal grantee which the law would recognize as such to receive the grant. *See case above cited.*

II.—Defendant has been released from all agreements or covenants which said trust deed may contain, because they were not signed by the old "Association" in 1856, as the covenants or agreements, if there were any in said deed, were mutual by and between the "Association" and defendant, and as the "Association," the pretended grantee, did not sign them and was not thereby bound, so that defendant could enforce the same, defendant is not bound by anything contained therein, covenants nor agreements. The agreements are void for want of mutuality. *6th Ed. Chitty's Con.*, page 15; *Randolph County vs. Jones, Breese R.*, 103.

III.—Our statutes on the subject of uses and trusts do apply to land as soon as it is entered at the proper United States Land Office and paid for, and if this position is not correct the said deed of 1856 from defendant is void, because made before the patent issued. *Camp vs. Smith*, 2 *Minn. R.*, 155.

IV.—Purchases by individuals (who are unincorporated,) must be made by them in their private capacities, and individual names, *e. g.*, a purchase by *eo nomine*, "German Land Association," is bad—purchasers must necessarily be either individuals or a corporation. Is not this deed to the old Association bad? *Dart's Vendors, &c.*, page 8.

V.—The trust is not fully expressed nor clearly defined upon the face of the instrument creating it, according to *Comp. Stat., Sec. 31, subdiv. 5, page 383*.

VI.—The three things which are indispensable to a valid trust are omitted in said trust deed: "First, sufficient words to raise it; Second, a definite subject; and Third, a certain or ascertained object." *Wharton's Law Dic., title "Trusts," page 1017*.

VII.—If plaintiff has any cause of action against defendant under the pretended covenants or agreements contained in said trust deed, before it can recover against defendant, it must show that in deeding to plaintiff the trustees thereby executed part of said trusts, and it must show that all the trusts have been executed; and until this is done plaintiff has no case against defendant, and defendant nothing to defend against. It does not appear from said trust deed and complaint that when the trustees deeded to plaintiff, that they thereby executed any of the said trusts.

VIII.—Said trustees were not holding said land for any person named, corporation or *cestui que trust* known in the law, and they could not make a valid deed to this plaintiff; and plaintiff not claiming said land under any other deed, does not show it has a right to maintain action.

IX.—The complaint does not show that plaintiff ever succeeded to the rights of the old "Association," nor that it was a proper person in the law that it could deed by its trustees to plaintiff.

X.—The law does not allow such a voluntary Association as this was in July 30th, 1856, to purchase or hold lands or to dispose of them. *Austin vs. Searing*, 16 *N. Y. Apl. R.*, 112; *Dart Vend.*, p. 8*.

XI.—We think it is immaterial for the purpose of this action whether defendant still has any interest in this land or not, and if we admit that he has not, does plaintiff state facts sufficient to constitute a cause of action? Does the complaint show that plaintiff owns the land? And if plaintiff does not show that it owns the land, then will not this Court sustain the order and dismiss the appeal, and render judgment for the respondent with his costs of suit?

By the Court—WILSON, C. J.—The German Land Association, being a mere voluntary association of persons unincorporated, had no legal capacity to take or hold real property.

A grant to such association *eo nomine* would pass no legal title. *Jackson vs. Cory*, 8 *John.*, 385; *Hornbeck vs. Westbrook*, 9 *Id.*, 73; *Jackson vs. Sisson*, 2 *John.'s Cases*, 321; *Sheppard's Touchstone*, 235-6-7; *Swaine vs. McCohany*, 4 *Ohio R.*, 157; *Thomas vs. Marshfield*, 10 *Pick.*, 364.

In this case the grant was not directly to the Association, but to T. and S. and H. in trust for the Association, and one question in the case is whether the beneficiaries are sufficiently described to enable the Court to execute the trust. Irrespective of the provisions of our statute, it would seem that this trust could not be sustained. Courts of equity carry trusts into effect only when they are of a certain and definite character. If, therefore, a trust is clearly created in a party, but the terms by which it is created are so vague and indefinite that courts of equity cannot clearly ascertain either the objects or the persons who are to take them, the trust will be held entirely to fail. 2 *Story's Eq. Juris.*, 979 a; *Galligos Ex. vs. Attorney Gen.*, 3 *Leigh*, 450; *Wheeler vs. Smith*, 9 *How. U. S. Rep.*, 55.

In the declaration of uses certainty was required, and that especially in three things: in the persons to whom, in the lands, &c. of which, and in the estates by which the uses were declared, and if there was a want of certainty in either of these, the declaration was not good, (2 *Sheppard's Touchstone*, 509, *id.*, 520; 1 *Sand. on Uses*, 238), and a trust is now merely what a use was before the statute of uses. *Tif. & B. on Trusts*, 3; 1 *Cruise's Digest*, title 12, chap. 1, sec. 2; 21 *Viner's Abridgement Trust*, 493; *id.*, 494, 503.

Our statutory provision on this subject removes any doubt that might otherwise be supposed to exist. In the creation of a trust of this character it is required that the trust shall be "fully expressed and clearly defined on the face of the instrument creating it." It has been found that secret and hidden trusts embarrass title, multiply litigation and are the common instruments of fraud,

being a cover for secret and fraudulent conveyances of property, made with a view to hinder and defraud creditors. *Irvin vs. Marshall et al.*, 20 How., U. S. Rep.; 10 *Bacon's Abridgement*, — *Uses and Trusts*—A, 113; 22 *Viner's Abridgment*, 179—Use—A, 3. Hence the necessity and reason of our law on this subject. The evils that the statute was intended to prevent, cannot be avoided, unless the trust deed show certainly on its face what are the objects and who are the beneficiaries of the trust property. To a person whose duty or interest it might be to inquire, this trust deed gives no light on any of these points.

The German Land Association was not by the law invested with any legal existence, and the trust deed gives no intimation as to who the persons were associated under that name. The deed was therefore void.

The plaintiff's counsel insist that our statute law as to uses and trusts is inapplicable in this case, and to substantiate this position cite *Irvine vs. Marshall et al.* Neither the decision nor the reasoning in that case is applicable in this. The question before the Court in that case was as to the rights and liabilities of parties purchasing lands from the United States—the Court deciding that a State or Territory could not control the acquisition or transmission of such property, or annex any conditions to the mode of such transmission, or limit or restrict the liability of agents or the rights of principals in the making of such purchases. The Court base their decision on the ground that such modifications or restraints would operate to restrict the sale of public lands, and thereby injure the revenue of the government.

In this case such question is not involved directly or indirectly. Here the title has passed from the government to defendant. The plaintiff does not question that title. He bases his right and claim exclusively on his contract with defendant—a contract not concerning the purchase of land from the government, but concerning the transmission of land by one citizen to another, and which admits that the title has legally passed out of the United States and vested in defendant. This contract is therefore governed by the laws of our State. *Wilcox vs. Jackson*, 13 *Peters*, 517.

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It is true that grants for charitable and pious uses have by courts of equity been sustained when made by trustees for the benefit of unincorporated institutions or associations, and when the *cestui que trusts* have been uncertain. The authorities in the United States are by no means harmonious as to the source or extent of the power of the Courts in this class of cases; but it not being claimed that this grant is for charitable or pious uses, it is not necessary for us here to inquire as to the extent of the jurisdiction of courts of equity over charities, or whether it rests in the provisions of the statute of 43 *Elizabeth*, or exists where that statute is not in force. I think that the complaint is insufficient in not showing that the plaintiff is the successor in interest of the said Association, but it not being necessary to decide this point, the Court has not passed upon it.

The order appealed from is affirmed. •

***DANIEL ROBBINS VS. SCHOOL DISTRICT NO. 1, ANOKA COUNTY.**

Subdivision 4, sec. 70, chap. 23, Comp. Stat., limits the fund out of which payment for the purposes specified therein shall be made by the trustees of a school district, but does not require that the funds shall be collected and paid to the trustees before they can contract for or purchase the objects embraced in the statute.

Under the provisions of this statute the trustees of a school district have authority to incur an indebtedness for the erection of a school house for the district, and postpone the payment of such indebtedness to a future day, and contract to pay interest on such indebtedness.

Evidences of such indebtedness, made by the trustees to R., in the form of promissory notes, are good between the parties as contracts for forbearance and promises to pay the amounts therein specified; and will bind the successors in

*This cause was heard and submitted before Mr. Justice Berry took his seat on the Bench.

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office of the trustees; and an action may be maintained thereon by the payee against the district, whether the trustees are in possession of the particular fund out of which the debt is payable or not.

Under *sec. 7, chapter 11, Session Laws of 1861*, the trustees of the school district of the town of Anoka, by their action in pursuance of said section, united Subdistricts Nos. One and Two, of said town, under the style of Subdistrict No. One of the Town of Anoka. *Held*—That the intention of the trustees must determine whether their action was a merger of Subdistrict No. Two in Subdistrict No. One or not, and where their action is pleaded as such merger, a demurrer to the complaint admits the fact.

The action of the trustees under this section, uniting or consolidating two subdistricts, both being corporations, must be regarded as a merger of the old corporations into the new one, and in the absence of provision to the contrary, the new corporation succeeds to the rights and liabilities of the old ones.

The saving clause in *section 60* of the act preserves the right of action, but the remedy must be had against the corporation as it now exists.

Where an indebtedness is payable out of a particular fund, the judgment must be executed out of that fund.

This action was brought in the district court of Anoka county. The allegations of the complaint are substantially: that in August, 1857, school district number two of Anoka county was a body corporate, duly organized under the laws of Minnesota; that at that time it designated a site for a school house in said district, levied a tax of \$600 to build the same, and contracted with the plaintiff to build said house at the agreed price of \$650; that plaintiff did build said house on said site; that on the 1st day of December, 1857, J. F. Clark, J. B. Lufken and A. W. Giddings were the duly elected, and qualified trustees of said district, and then accounted and settled with plaintiff for building said school house, and found and agreed upon a balance due the plaintiff therefor, to wit, \$571.10; that in consideration of said sum of money, the said trustees made, executed and delivered to plaintiff two several instruments in writing, of which the following are copies:

“§363.71. Eight months from date we the trustees of School District No. 2 of Anoka county, promise to pay Daniel Robbins, or
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his order, three hundred and sixty-three dollars and seventy-one cents, interest at three per cent. per month until paid, for value received.

Dec. 1, 1857.

Trustees, { J. F. CLARK,
J. B. LUFKIN,
A. W. GIDDINGS."

"\$207.39. Eight months after date we the trustees of School District No. 2, of Anoka county, promise to pay Daniel Robbins, or order, two hundred and seven dollars and thirty-nine cents, with interest at two per cent. per month until paid, for value received.

Dec. 1, 1857.

Trustees, { J. F. CLARK,
J. B. LUFKIN,
A. W. GIDDINGS."

That on the same day said trustees accepted and took possession of said school house; that said district occupied the same for school purposes until the fall of 1861; that in the fall of 1861 the said district, which was at that time sub-district No. 2 of the organized township of Anoka, in said county, was by action of the trustees of said district of Anoka township, merged in sub-district No. 1 of said township; that said sub-district No. 1 was at the said time, by the action of the said trustees, constituted of what had before that time been sub-districts Nos. 1 and 2 of said township; that school district No. 1 of Anoka county, the defendant, is a corporation duly organized under the laws of Minnesota, and is identical with the said sub-district No. 1 of the township of Anoka, and embraces the whole of said school district No. 2 of Anoka county. That upon the formation of the said sub-district No. 1, it took possession of said school house, which ever since has been, and now is, used and occupied by said sub-district No. 1, which is now school district No. 1, Anoka county, the defendant; that no part of said sum of money has been paid, that plaintiff is the legal owner and holder of said instruments. Judgment for \$691.57 with interest from August 1, 1858, is demanded.

The only material allegation of the complaint put in issue by the answer is, "that on the first day of December, 1857, J. F. Clark,

J. B. Lufkin and A. W. Giddings were the duly elected and qualified trustees of school district No. 2 of Anoka county." This issue was submitted to a jury, who were instructed by the Court to bring in a special verdict. The jury found the allegation true. The plaintiff moved the Court for judgment, which motion was granted, and judgment rendered for the amount demanded in the complaint.

The defendant sued out a writ of error.

GREENLEAF CLARK and BIGELOW & DALRYMPLE for Plaintiff in Error.

I.—School District No. 2 in the County of Anoka, had no power to incur the indebtedness for which this suit was brought.

When the mode of executing the powers granted to a corporation is expressly prescribed, no other mode can be adopted. *Angell & Ames on Corporations*, Sec. 111; *N. Y. Fireman's Ins. Co. vs. Ely*, 2 Cowen, 699; *Heard vs. Providence Ins. Co.*, 2 Cranch, 127; *Bank of Augusta vs. Earle*, 13 Peters', 519; *The Farmers' Loan and Trust Co. vs. Carroll*, 5 Barb., 649; *Hart & Munson vs. The Regents of University*, 7 Minn., 61.

And especially is this true of School Districts, which are quasi corporations with limited powers. *School District vs. Thompson*, 5 Minn., 280.

And a corporation which is confined in its expenditures for a certain purpose to a particular fund actually received by it, cannot incur a debt for such purpose. *Barmester vs. Norris*, 8 Eng. Law and Eq. R., 487, 490, 491; *McCulloch vs. Moss*, 5 Denio, 567, 579; *Silver vs. Cummings et al.*, 7 Wend., 183; *Horton vs. Garrison*, 23 Barb., 176; *Hart & Munson vs. The Regents*, cited ante.

The Trustees of School District No. 2, were empowered to build a school house only "out of the funds collected and paid to them for such purpose." *Comp. Stat., Ch. 23, Sec. 70, page 360.*

The Legislature very wisely withheld from the Trustees the power to run the District in debt.

Before the plaintiff below can maintain an action for the building of the school house, he must show that the condition upon which the power of the Trustees to act in the premises depended, was complied with, *i. e.*, that the funds for the purpose were collected and paid. *See cases before cited.*

And even if that were shown, he could only resort for the collection of his claim to that particular fund, upon the credit of which he must be presumed to have contracted. *Hart & Munson vs. The Regents, cited ante.*

His remedy would then be by a suit brought specially to reach such fund.

It is clear that the Legislature did not confer upon the Trustees the power to incur indebtedness on the mere strength of the levy of a tax.

The language employed in *Sec. 70, page 360, Comp. Stat.*, is not capable of such a construction, and the section was obviously intended to prevent just such transactions as this.

II.—The promissory notes described in the complaint have no validity as against the School District.

Hence in any event the judgment below is erroneous, because it includes interest at three per cent. per month on the original consideration.

III.—Whatever may have been the rights of the defendant in error, (plaintiff below,) as against School District No. 2 in the County of Anoka, he is not entitled to recover against the defendant below in this action.

Between this corporation and the plaintiff below there is no privity of contract.

There is no principle known to law or equity by which one body corporate can be compelled to pay a debt contracted by another body corporate, unless there has been a valid promise to pay it, any more than there is that one natural person can be compelled to pay the debt of another natural person. *See Gould vs. School District, 7 Minn., 203.*

The remedy of the plaintiff below, if he was entitled to any, (and unless he could maintain a personal action against the Trus-

tees, a point which we do not propose to consider,) was against the corporation with which he contracted and to which he gave the credit, and if he contracted upon the credit of any particular fund, then to enforce a collection out of that fund. The statute expressly saved the life of the corporation for the purpose of enforcing this claim. *Comp. Stat., Ch. 17, Sec. 346, page 335; see also Laws of 1861, page 71, Ch. 11, Sec. 60, and Laws of 1862, page 28, Ch. 1, Sec. 37.*

D. A. SECOMBE, for Defendant in Error.

I.—It fully appears from the allegations of the complaint which are not denied, that the original indebtedness of school district No. 2 was incurred within the power conferred by statute. *Revised Stat. Minn., Chap. 29, Secs. 6 and 12; Comp. Stat. Minn., p. 358–60.*

II.—It was a competent act of the trustees of the district to liquidate the amount of indebtedness, and to give written evidence of the amount found due to be paid at the time agreed upon. 4 *Barbour* 277; 23 *id.* 176.

III.—The plaintiff in error is the successor of and liable for the debts of said district No. 2. *Comp. Stat. p. 616, Secs. 15 and 16; Laws of 1861, Chap. 11, Secs. 1, 2, 5, 7 and 9; Laws of 1862, Chap. 1, Secs. 1, 2 and 25; 7 Minn. R., 210; 4 Mass. R. 329; 4 Barb. 122.*

By the Court—McMILLAN, J.—The first question presented in this case for our determination is whether School District No. 2 of Anoka County, the original contracting party, had power to incur the indebtedness for which this action is brought.

The statute in force at the time of making the contract set forth in the complaint, in defining the powers of school district meetings, prescribes among other things that they shall have power “to designate a site for the district school house; to levy such tax (not exceeding six hundred dollars in any one year) on the taxable property in the district as the meeting shall deem sufficient

to purchase or lease a suitable site for a school house, and to build, hire or purchase such school house, and keep in repair and furnish the same with necessary fuel and appendages." *Comp. Stat.*, p. 358, *sec. 64, subdiv. 4, 5.*

The same statute prescribes, among other things, as the duty of the *trustees*: "To purchase or lease a site for the district school house, as designated by a meeting of the district, and to build, hire or purchase, keep in repair and furnish such school house with necessary fuel and appendages out of the funds collected and paid to them for such purpose, and to have the custody and safe keeping of the district school house." *Comp. Stat.*, p. 360, *sec. 70, subdiv. 4.*

It is evident from the sections cited that the directions to contract for the erection or lease of a school house must come from the district meeting, and in the powers conferred on that meeting there is no limitations as to the *amount* which shall be expended for the purposes designated, the only limitation being as to the amount of tax which may be levied *in any one year*, namely, six hundred dollars. With this restriction it is left to the inhabitants of the district to determine whether their necessities will require them to incur a greater amount of expense for the objects mentioned than can be defrayed in any one year. So far, therefore, as the district meeting is concerned, in our opinion, there is nothing in the statute preventing them from directing the trustees to incur a greater indebtedness than may be met by the tax levied for one year. Nor does the section prescribing the duties of the trustees, conflict with this view. It cannot be doubted that the power to lease a site for the erection of a school house is conferred on the trustees. It is not reasonable to suppose that it was intended by the statute to confine them to a single year, or the fraction of a year, as the term of the lease of a site upon which the district would incur the expense of erecting a school house, nor that the school district should be placed at the disadvantage of not being able to contract a lease by the terms of which the rent should be payable in installments, yet if the collection and possession of the funds is a condition precedent to the right of the trustees to

contract, they could not lease a school house or a site for a school for a term of years without paying in advance all the rent which would accrue during the term; nor could they contract a lease for any term of years by which the aggregate amount of rent reserved should exceed six hundred dollars. Indeed, the district could do nothing whatever in the accomplishment of the purposes for which it was organized until a tax was levied, assessed, collected and paid to the trustees. Such could not have been the intention of the statute. The restriction is general and applies alike to leasing and building—both are in the same category. We think, therefore, the effect of the statute is to limit the fund out of which payment for the purposes specified therein shall be made by the trustees, but it does not require that the funds shall be collected and paid to them before they can contract or purchase. We are of opinion, therefore, that the trustees, in this instance, had authority to incur the indebtedness sued upon, and postpone the payment of it to a future day, and to contract for interest as the consideration of the forbearance. As this action is brought upon the accounting between the plaintiff and the trustees of the school district, and the evidence of indebtedness given by them thereon, which is still in the hands of the promisee, it is not necessary to determine, nor are we to be understood as deciding, that the trustees have power to execute negotiable paper. The instruments, however, are valid between the parties, as a contract for forbearance and a promise to pay the amount specified, which will bind the successors of the original trustees, and upon which suit may be brought against the district. *Comp. Stat.*, page 616, *Secs. 15, 16*; *Hart & Munson vs. Regents of the University, &c.*, 7 *Minn.*, 61. And this whether the trustees are in possession of the particular fund out of which the debt is payable or not. In New York under a statute similar to our own, in an action of assumpsit for work, labor and material in building a school house for a school district, when the work was done under a written contract between the plaintiff and the trustees of the school district, and the action was brought against the successors of the trustees who made the contract, it was held by the Court of Appeals, Justice

Bronson delivering the opinion, that the defendants were liable on the valid contract of their predecessors in office whether they had funds or not. *Williams vs. Keech and others*, 4 *Hill*, 168; *Stanton vs. Camp*, 4 *Barb.*, 277.

It remains to consider whether the action can be maintained against the defendant.

The corporation School District, No. 2, of the County of Anoka, which contracted this indebtedness, was formed under *Sec. 59, Ch. 23, Comp. Stat.*, page 357. This act remained in force until its repeal by the act approved March 7, 1861. The latter act created each township organized, or that might thereafter be organized in any county, a school district and body corporate, and vested in it the title to all lands or other property then held or which might thereafter be acquired for school district purposes in any such town, and provided that the several districts should be subdivided into subdistricts creating each subdistrict a body corporate.

The 5th section of the act provided that the several school districts organized before the passage of the act, should be subdistricts of the town in which they were situated, and might be altered by the trustees of the district in the manner provided in the act. The 7th section prescribes the mode of formation and alteration of subdistricts.

By the operation of section 5 of the act, school district, No. 2, of Anoka County, the contracting party in this case became subdistrict No. 2, of the town of Anoka, the only change being that of its title. Under the provisions of section 7 of the act, by the action of the trustees of the district of the town of Anoka, it was united with subdistrict No. 1, of the same town, or as the complaint alleges "was merged in subdistrict No. 1," both subdistricts constituting subdistrict No. 1, of the town of Anoka. The act of 1861, under which the union of the two subdistricts took place, was repealed by the act approved March 6, 1862. By the last act each subdistrict organized, or set off but not organized, and each district thereafter organized, is declared to be a school district and body corporate, and is vested with the title to all land and

other property held at the passage of the act, or which may thereafter be acquired for school district purposes in such district.

By the operation of the act of 1862, it will be perceived the style of "subdistrict No. 1, of the town of Anoka," was changed to "school district No. 1, of the county of Anoka," which is the present defendant, no other change being effected. The mere change of name does not affect the existence or character of the corporation, nor the rights of parties dealing with it. *Gould vs. Subdistrict No. 3, &c., 7 Minn., 203.*

The only substantive change, therefore, in these districts was that effected by the action of the trustees under the act of 1862, in uniting the two subdistricts. We will consider the effect of this action. The allegation in the complaint is that subdistrict No. 2, was merged in subdistrict No. 1. This allegation is not denied. If it was the intention of the trustees to preserve the existence of subdistrict No. 1, and merely to incorporate subdistrict No. 2 into it, we apprehend their intention must prevail; we are to arrive at the effect of the action as to the creation of a new corporation, or the continuance of an old one by the intention of the trustees. As the action of the trustees is not in evidence before us, the only way we can arrive at the intention is from the pleading, and as the fact is pleaded as a merger of subdistrict No. 2 in subdistrict No. 1, and is not denied, we think the effect of the action was to preserve the existence of subdistrict No. 1, and incorporate subdistrict No. 2 into it.

"To ascertain whether a charter create a new corporation or merely continue the existence of an old one, we must look to its terms and give them a construction consistent with the legislative intent of the corporators."

But regarding the action of the trustees in the light of a consolidation or union of both subdistricts, we think the effect in this case is the same. The identity or separate existence of each is lost and absorbed in the new corporation created by the consolidation. The property real and personal of each of the original subdistricts is vested in the subdistrict formed from them. The purposes of the new and old corporations are identical; the ter-

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ritorial limits of the latter are the same as the former, and while the corporation thus formed must be conceded to be a new creation, it is not distinct from the old subdistricts, but must be regarded as a legislative merger of the old corporations into the new one. This is to be distinguished from a dissolution in law of the old corporations. By the latter at common law the personal estate of the corporation escheats to the State, and its realty reverts to the grantor or his heirs; by the former the new corporation succeeds to the rights and liabilities of the old one. *Angell & Ames on Corporations, Secs. 779, 780.*

The saving clause in section 60 of the act preserving the rights of districts, as well as parties dealing with them, whatever may be its extent, we do not think affects this case. The right of action is preserved, but the remedy must be had against the corporation as it now exists. The action, therefore, is properly brought.

As the indebtedness sued upon is payable out of a particular fund, the judgment must be executed out of the funds levied, assessed and collected by the trustees, or to be levied, assessed and collected by them for that purpose.

Judgment affirmed.

***JOHN CHAPMAN VS. MILES W. DODD.**

Where a criminal docket is kept by a Justice of the Peace and a record made of proceedings before such Justice the record is competent evidence. No signature to the docket is required; it may be identified by the Justice or any other competent evidence.

In an action for malicious prosecution, the complaint, after alleging the examination before the Justice, avers: "at which examination the defendant did

*This cause was heard and submitted before Mr. Justice Berry took his seat on the Bench.

not appear to support his said complaint, and upon such examination the said Justice adjudged that the plaintiff was not guilty of such offence, and that there was no probable cause for charging him therewith, and fully acquitted him thereof." The record offered showed, that upon the examination the complainant did not appear, and as there was no witness for the prosecution the case was dismissed and the prisoner discharged, &c. *Held*—That the docket was admissible to show the termination of the prosecution, and that there was no variance between the proof and allegation.

Where a complaint charges a crime and the prosecution is instituted before a tribunal having jurisdiction, and the defendant arrested upon a warrant regular upon its face, an action for malicious prosecution will lie.

The depositions of witnesses taken by a Justice of the Peace on the examination in a criminal case, are not a part of the record of the proceedings before the Justice.

The reasons of a Justice of the Peace for the discharge of a defendant can not be shown to impeach his record, and for other purposes are immaterial.

In an action for malicious prosecution the conduct and declarations of the defendant toward the plaintiff about the time of the prosecution, tend to characterize the *animus* of the defendant, and are proper to go to the jury to show express malice.

The only effect of sections 15 and 25, of chapter 103, *Comp. Stat.*, is to relieve the examinations of witnesses, taken in accordance with their provisions, of their otherwise extra-judicial character; the same rules are applicable to them as evidence which apply to other depositions. When the witness himself may be produced, the deposition is not admissible.

Probable cause does not depend on the actual state of the case in point of fact, but upon the honest and reasonable belief of the party commencing the prosecution. The facts or circumstances upon which the prosecutor acted must constitute probable cause. The existence of the facts is an original question upon the trial for malicious prosecution, and is to be found as any other fact. The testimony of witnesses given upon the trial of the criminal action cannot be proved but by the witnesses themselves, or if they are dead, by the usual secondary evidence.

As under our legislation the defendant is a competent witness, he stands in the same position as other witnesses.

Where it in no manner appears that the witnesses whose depositions were taken on the examination, are dead or can not be procured on the trial, but the defendant is present at the trial, the depositions are not admissible.

The Court charged the jury that "the acquittal of the plaintiff before a

Justice of the Peace is *prima facie* evidence of want of probable cause; and from want of probable cause the jury may infer malice." *Held*—where the only discharge or acquittal in evidence was the discharge by the Justice of the Peace, that the jury could not have been misled by the use of the word *acquittal*, and that the charge referred to the discharge of the plaintiff by a Justice of the Peace.

When on an examination in a criminal case, before a Justice of the Peace, all the facts in regard to the commission of the crime charged are stated as within the personal knowledge of the prosecutor, and he is examined before the magistrate, by whom the party charged with the crime is discharged, such discharge is *prima facie* evidence of want of probable cause. The calling of witnesses for the defence on the examination, does not affect the discharge as evidence.

The question of probable cause was not left to the jury by the charge given.

The jury are the proper judges of the amount of damages to be allowed in actions of this kind, and unless there is something in the case showing that the jury in their determination were influenced by passion, prejudice, or some improper motive, the Court will not interfere to disturb their verdict.

This action was brought in the Fillmore County District Court for malicious prosecution. Issue was joined therein, and the cause was tried at the December term, 1863, and resulted in a verdict in favor of plaintiff for \$1,500. During the trial various exceptions were taken to the admission of testimony, both by the plaintiff and defendant, and also an exception by the defendant to the charge of the Judge. Upon the reception of the verdict, the defendant moved for a new trial upon the following grounds, viz: First, excessive damages appearing to have been given under the influence of passion or prejudice.

Second, insufficiency of the evidence to justify the verdict, and that the same is against law.

Third, errors in law occurring at the trial and excepted to by the defendant.

The Court denied the motion and the defendant appeals to this Court.

A sufficient statement of the cause of action and of the exceptions taken on the trial, appear in the opinion of the Court.

R. A. JONES for Appellant.

C. G. RIPLEY for Respondent.

By the Court—McMILLAN, J.—This is an appeal from an order of the District Court denying a motion for a new trial. The action was brought in the Court below, for malicious prosecutions. The complaint contains two causes of action. The first alleges a prosecution by the defendant Dodd, against the plaintiff, before C. W. French, a Justice of the Peace, for the crime of sodomy. The second count alleges a prosecution before H. G. Reppy, a Justice of the Peace, for the crime of an attempt to commit sodomy. Each prosecution is alleged to have been malicious and without probable cause, and in each case it is alleged that the justice upon the examination adjudged that plaintiff was not guilty of the supposed crime, and that there was no probable cause for charging him therewith, and fully acquitted him thereof. The cause was tried and resulted in a verdict for the plaintiff, whereupon the defendant moved for a new trial, which was denied, and the defendant appealed.

The first two questions put to the witness Reppy, were merely preliminary to the proof and introduction of the docket, and the objections were properly overruled.

It is urged that the Court erred in admitting the docket of the Justice, Reppy, because—

First—There is no statute authorizing a docket in such cases.

Second—That it does not correspond with the allegations in the complaint.

Third—There is no signature of any magistrate to the docket.

Whether the statute requires a criminal docket to be kept by Justices of the Peace in cases of this kind, is immaterial, it appears that a docket and a record were made of the proceedings in this instance. Under such circumstances the record is clearly competent evidence. 1 *Greenl. Ev.*, Sec. 513. No signature is required to the docket; the record may be identified by the Justice, or any other competent proof. Was there a variance between the allegation and the proof offered? The complaint after alleging the examination before the Justice, avers “at which ex-

amination the defendant did not appear to support his said complaint, and upon such examination the said Justice adjudged that the plaintiff was not guilty of such offence, and that there was no probable cause for charging him therewith, and fully acquitted him thereof," &c.

The record offered shows that upon the examination "the complainant did not appear, and as there was no witness for the prosecution, the case was dismissed and the prisoner was discharged," &c.

It is necessary in an action of this kind to show the termination of the prosecution upon which it is based, and the termination must be shown substantially as alleged. Unless, however, there is a substantial difference between the allegation and the proof it will not be regarded as a variance, if as in this case the termination is pleaded according to its legal effect. We think the proof in this instance sustains the averment, and was admissible for the purpose of showing the termination of the prosecution before Reppy. Where a magistrate has authority only to bind over or discharge a person accused, and he discharges him, the discharge is equivalent to an acquittal, and will avail the accused as evidence to support an allegation of acquittal. *Sayles vs. Briggs*, 4 *Met.*, 421. The complaint in this case follows the precedents in like cases, 2 *Ch. Pl.* 610 and note *O*, (10 *Am. Ed.*) 1 *Arch. N. P.*, page 590.

The complaint and warrant in the case before Reppy were objected to on the ground that the complaint was not subscribed by the defendant. The making of the complaint and issuance of the warrant are admitted by the answer, and the evidence may not have been necessary. However that may be, we are of opinion that notwithstanding the defect, the action for malicious prosecution will lie. The complaint charged a crime and the prosecution was instituted before a tribunal having jurisdiction, and a warrant regular upon its face was issued, and the defendant arrested—this will sustain the action. *Stone vs. Stevens*, 12 *Conn.*, 225, and authorities cited; *Morris vs. Scott*, 21 *Wend.*, 281.

The second witness called by the plaintiff was C. W. French,

who testified that he was a Justice of the Peace. The plaintiff then asked the witness this question: Was there any criminal proceedings before you as such Justice by the complaint of Dodd the defendant, against the plaintiff Chapman, about June 15, 1863? Which was objected to as irrelevant and incompetent. The objection was overruled and the defendant excepted. The witness answered there was a complaint made before me by defendant Dodd against plaintiff Chapman, June 15, 1863, charging him with the crime of sodomy. The plaintiff then asked the witness to produce his docket of said proceedings, and all papers relating to said proceedings filed in said case. The defendant objected that the same were irrelevant and incompetent. The Court overruled the objection, and defendant excepted. The witness then produced his docket, the complaint made and the warrant issued, which were severally read to the jury. The docket in this instance showed the examination of the defendant as a witness for the State, and four other persons as witnesses for the defendant, and the determination of the prosecution as follows: "After hearing the testimony of the above witnesses there was nothing to show that the crime of sodomy had been committed; the defendant was therefore discharged."

These objections are both disposed of by the determination of similar objections to the docket and examination of the witness Reppy.

The witness French upon cross examination testified that the defendant Dodd was present (at the examination) and examined as a witness for the prosecution. There were three or four witnesses for the defence. I took the evidence in writing in the shape of depositions as it was an examination. I have the evidence here. The defendant asked the witness to produce the same for the purpose of reading the same to the jury, which was objected to as irrelevant and incompetent. The objection was sustained and the defendant excepted. This evidence was clearly incompetent as a cross examination. The depositions or examination of the witnesses had not been referred to in the examination in chief, and were not any part of the record offered by the plain-

tiff, nor was the plaintiff required to offer them in evidence. *Briggs vs. Clay*, 3 *Ner. & M.*, 464.

The defendant then asked the witness, why did you discharge the plaintiff Chapman on the examination before you, which was objected to by the plaintiff, as incompetent and irrelevant. The objection was sustained and the defendant excepted.

The reasons of the Justice for his judgment are entirely immaterial, and if the object was to impeach the judgment, it was incompetent. The judgment of the Justice cannot be thus impeached. *Bacon vs. Towne and others*, 4 *Cush.* 236. If it was desired to rebut the effect of the judgment as evidence of want of probable cause, it must be done in another way.

The plaintiff called as a witness Elizabeth Schofield, who testified that she lived with the defendant in June last (1863), and before that time. Plaintiff lived with the defendant about two months while I was there; left some time in May last—about the end of May. The plaintiff asked the witness to state whether the defendant and plaintiff had any quarrel or difficulty at the time the plaintiff left the defendant; to this the defendant objected, and the Court overruled the objection and defendant excepted. The witness answered: cannot state the language; but Dodd did not seem willing that the plaintiff should leave him; plaintiff had been at work for Dodd.

The plaintiff also asked the witness, "Have you at any time since May, 1863, heard any conversation between defendant and any person relating to plaintiff?—if yea, state the same;" which was objected to by the defendant as irrelevant and incompetent. The objection was overruled and the defendant excepted. The witness answered: I heard a conversation between the defendant and one Sherman shortly after the plaintiff left defendant. Sherman was asking whether defendant thought plaintiff could be got to work on the railroad. Defendant answered that if the plaintiff did not work for him he would not work on railroad or anywhere else long.

It is competent for the plaintiff in an action for malicious prosecution to prove express malice on the part of the defendant. The

conduct and declarations of the defendant toward the plaintiff; about the time of the prosecution, tend to characterize the *animus* of the defendant, and are proper to go to the jury to show express malice. 2 *Greenl. Ev.*, sec. 453; 2 *Stark. Ev.*, 783; *Caddy vs. Barlow*, 1 *Man. & Ryl.*, 252. We think the objections were properly overruled.

The plaintiff having rested his case, the defendant moved that the action be dismissed on the ground of the insufficiency of the evidence to justify a verdict for the plaintiff. The motion was denied and the defendant excepted. There was sufficient evidence in this case to submit the case to the jury. The motion was properly denied.

The defendant upon his part then called as a witness, C. W. French, who testified as follows: "I am the Justice before whom plaintiff was examined on the charge of having committed the crime of sodomy. The evidence was taken in writing before me." The defendant offered to produce said evidence for identification by the witness, and then read the same to the jury to which the plaintiff objected. The Court sustained the objection and the defendant excepted. We will consider this objection as if the evidence had been produced and offered. The statute relating to the examination of offenders, &c., contains the following provisions. *Pub. Stat., Ch.* 103.

"Section 15. The testimony of the witnesses examined shall be reduced to writing by the magistrate, or under his direction, when he shall think it necessary, and shall be signed by the witnesses if required by the magistrate.

"Sec. 25. All examinations and recognizances taken by any magistrate in pursuance of the provisions of this chapter, shall be certified and returned by him to the District Attorney or the Clerk of the Court before which the party is bound to appear, on or before the first day of the sitting thereof, and if such magistrate shall neglect or refuse to return the same, he may be compelled forthwith by rule of Court, and in case of disobedience, may be proceeded against by attachment as for contempt."

The statute nowhere prescribes the effect of examinations taken
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pursuant to these sections. We cannot presume that it was the intention of the Legislature in these provisions to change any rule of evidence. These provisions are not novel ones in criminal jurisprudence, and we are not left without authority as to their purpose and effect. Similar statutes have existed in England since as early a period as A. D. 1554. 1 *and 2 Ph. & M., Ch. 13*; 2 *and 6 Id., Ch. 10*; *Roberts' Dig.*, 77, 81. And in referring to the statute of 7 *Geo. 4, Ch. 65, Sec. 2*, which was a substitute for the former statutes, Mr. Starkie remarks, the object of this legislation was to enable the Court to see whether a person had been properly admitted to bail, and whether the witnesses were consistent or contradictory in the evidence which they gave, without manifesting any intention to alter the law of evidence. But such depositions in being warranted by the former and present statutes, became evidence in particular cases upon general principles of evidence, that objection having been removed by the statutes which would otherwise have operated to their exclusion, namely that they were extra-judicial. 2 *Stark. Ev.*, 382, *title Depositions*.

The only effect, therefore, of the statute is to relieve these examinations of their otherwise extra-judicial character. The same rules, therefore, are applicable to them as evidence which apply to other depositions. It is a well settled principle that depositions are in their nature secondary evidence—they bear upon their face evidence of a more original source of information, namely, the living witness, and under the rule that the best evidence of a given fact must be produced, are not admissible until the proper grounds exist for their admission as secondary evidence. Without advert- ing to all the qualifications of this rule, it is sufficient to say that when the witness himself may be produced the deposition is not admissible. 1 *Stark. Ev.*, 310; 2 *Id.*, 382. But the position assumed by the appellant's counsel is that the fact to be proved is what was testified to on the hearing before the Justice, not what the witnesses will now testify to, and that the depositions are the best evidence. This position, we think, is erroneous. This action is to be carefully distinguished from an action against a Justice for a malicious conviction. The defence to be maintained by

the defendant here is that there was probable cause for the *prosecution*. Probable cause does not depend on the actual state of the case in point of fact, but upon the honest and reasonable belief of the party commencing the prosecution. *Bacon vs. Tower and others*, 4 *Cush.*, 239. In the former case the conviction is based upon the evidence before the Justice. In the latter the prosecution is based upon the existence of a state of facts prior to its institution. The testimony delivered upon the hearing could not have influenced the action of the prosecution in commencing the proceedings, for at that time it had no existence; but it was the existence of facts and circumstances relied upon by the prosecutor before instituting the prosecution which induced his action. The testimony upon the trial could not have originated the facts, but was merely the evidence of their prior existence; it is the facts or circumstances, therefore, upon which the prosecutor acted which must constitute probable cause, and not the evidence of them given upon the trial. The existence of the facts, then, is an original question upon this trial, and although they may have been once proved before another tribunal, that does not establish them for this trial, but they are to be established here *de novo*. The best evidence of the facts must, therefore, be produced, which clearly excludes the depositions offered. We find ample authority to support this position. In *Burley vs. Bethune*, which was an action against a magistrate for a malicious conviction, Gibbs, C. J. says: There is a wide distinction between an action against the prosecutor for a malicious prosecution, and an action against a magistrate for a malicious conviction. In the former case proof that there was in reality no ground for imputing the crime to the plaintiff, shows that the prosecution was instituted without probable cause and malice may be inferred from thence. What passed at the trial is in that case immaterial. The prosecutor may have sworn to the truth of the charge, but that will not show that he had a probable cause for it. 5 *Taunt.*, 583.

The rule laid down by Greenleaf is clear and distinct. And in *proof of probable cause* for a criminal prosecution, it seems that the testimony of the defendant himself to facts peculiarly within

his own knowledge given upon the trial, *diverso intuitu*, is admissible in the action against him for causing that prosecution. But the testimony of *other witnesses* given on that occasion cannot be proved but by the witnesses themselves, or if they are dead by the usual secondary evidence. 2 *Greenl. Ev.*, Sec. 457, and *authorities cited*. The same rule is distinctly laid down in *Burt vs. Place*, 4 *Wend.*, 591; *Richards vs. Foulk*, 3 *Ohio*, 53; *Haidekoper vs. Cotton*, 2 *Penn. R.*, 149; *Id.*, 3 *Watts*, 56; *Lauence vs. Lanning*, 2 *Carter*, 256; see also 1 *Greenl. Ev.*, Sec. 352. In treating of this action, Buller says: "As it (malice) may come to be left to a jury, it is advisable for the defendant to give proof of probable cause, if he be capable of doing it, and for this purpose proof of the evidence given by the defendant on the indictment is good." *Buller, N. P.*, 14. The evidence referred to here, we think, is the evidence of the defendant personally, and not the evidence generally offered on the part of the prosecution, for in a subsequent paragraph the same writer says: "when the action is for a malicious prosecution for felony, the first part of the defendant's defence must be to prove a felony committed, and therefore, *if no body were by at the time* of the supposed felony, but the defendant or his wife, their oath at the trial of the indictment may be given in evidence to prove the felony. *Buller, N. P.*, 15.

"Where in case for a malicious charge of felony the *plaintiff* puts in to prove a formal part of his case the defendant's and another person's depositions before the magistrate, the defendant has a right to use *his own* deposition as evidence in the cause, but not that of the other deponent." *Steph., N. P.*, 2283; citing *Jackson vs. Bull*, 2 *M. & Rob.*, 176.

In an action on the case for a libel upon the plaintiff by the proprietors of the Cheltenham Examiner, the defendants pleaded a justification. The libel consisted in a publication charging the plaintiff with having falsely and maliciously accused his mother-in-law and others of forging or conspiring to forge a will. The counsel for the defendants having examined in chief a witness who was present during the inquiry before the magistrate into the charge preferred by the plaintiff against the mother-in-law and

the others, the plaintiff's counsel proposed to ask the witness on his cross examination what was said by the other witnesses who had been examined on the part of the prosecution at the inquiry. The point involved here was whether the prosecutor had reasonable or probable cause for instituting the criminal proceedings, and the object of the plaintiff was to prove probable cause by showing the testimony before the Justices—precisely the point in the case at bar. Tindal Ch. J., says: You have a right in an action for a malicious prosecution to have the story which the prosecutor has himself given, from the necessity of the case, but no such necessity exists here; you can call the witnesses who were examined before the magistrate at Cheltenham, but you wish to give in evidence what they then said, without subjecting them to a cross examination. The evidence was rejected. *Newton vs Rowe and another*, 1 Car. & Kirw., 616; 47 Eng. Com. L., 616.

It is true the authorities in Massachusetts, Connecticut, New Hampshire, and some other States, are *contra*. In *Bacon vs. Towne and others*, 4 Cush., 239, the Court lays down the opposite rule, and after defining probable cause as we stated *ante*, says: "The facts testified to in the examination may have been very influential in raising such suspicion or belief, and are therefore competent evidence to show the ground he had of cause to believe, whether they were true or not. They are therefore facts material to the issue to be proved by any witness who can testify to them as well as by those who testified at the examination. These witnesses may be dead, absent or insane; they may have forgotten them, or refuse to testify to them, or even deny them, it is not the less true that they did so testify, and if the testimony was of a character to induce a belief or strong suspicion in the mind of a reasonable man of the guilt of the accused of the crime charged, they had a direct bearing on the issue of probable cause or not in the action for malicious prosecution."

There is no doubt that the facts testified to on the examination may be material and competent to show probable cause, but, with the greatest respect for the opinion of the learned Court, we think it does not follow that the evidence given on the examination to

establish such facts is competent on the trial of the action for malicious prosecution. The question is, how shall the facts be established now; shall the proof of them given on the examination be admitted on the trial of this action? Evidence of a third party that certain facts were testified to is not the best evidence of the existence of the facts, and that is what the rule requires. But the Court says, these witnesses may be dead, absent or insane; then upon proof of the facts the ground is laid for the admission of secondary evidence, and proof of their testimony is admissible under the rule. But the Court further say, the witnesses may have forgotten or refuse to testify to the facts, or even deny them. We can only say that these, although extreme instances, are misfortunes to which every suitor is liable, but they form no exception to the rule of evidence, and are no reasons for its violation. A witness in any case may forget the most important fact, yet it will scarcely be contended that that would be ground for the admission of secondary evidence. If a witness refuses to testify, the law punishes for contumacy, and compels him to testify; if he swears falsely it punishes him for the perjury. We see nothing, therefore, in the reasoning of the Court which satisfies us of the correctness of the rule laid down in that case. And as the question is a new one in the jurisprudence of our State, we are at liberty to take that view which seems to us most in harmony with principle and the weight of authority on the question.

The reason why the deposition or testimony of the defendant himself upon the hearing was admissible, was solely because he was not at common law a competent witness in the civil action. 1 *Greenl. Ev.*, Sec. 352, and note 2. As under our legislation no such disability exists, the same rule cannot apply, but the defendant stands in the same position as other witnesses. *Cessante ratione cessat ipsa lex.*

As it in no manner appeared that the witnesses whose depositions were offered were dead, or could not be produced on the trial, but on the contrary the defendant was present at the trial, the testimony was properly rejected by the Court.

The defendant having been called as a witness, in the course

of his examination, after stating the circumstances of the alleged offence by the plaintiff, testified: I did not speak to him about it; I was so shocked that I did not know what to do; I went to Winona afterwards in a few days and took counsel there, and came back and made the complaint before Justice French. The defendant's counsel then asked the witness the following question: "After you had witnessed the criminal act of the plaintiff, what did you first do in relation to the same, and why did you not complain of him at once?" to which the plaintiff objected as irrelevant; the Court sustained the objection, and the defendant excepted. We think the question was relevant, and so far as the objection is concerned should have been allowed. But as the object of the question clearly was to account for the delay in making the information, and the witness had just stated fully his action in the premises, and his reasons for the delay, we cannot see that any injury could result to him from the ruling of the Court, and we do not feel at liberty to disturb the verdict on this ground.

The Court in the charge instructed the jury as follows: "The acquittal of the plaintiff before the Justice of the Peace is *prima facie* evidence of want of probable cause. And from the want of probable cause, the jury may infer malice." To which the defendant excepted.

It is urged by the respondent that the word "discharge" was used by the Court instead of "acquittal," and that the instruction was limited in its application to the discharge by Justice French, and that the present state of the paper book is an oversight. However that may be, the only discharge or acquittal in evidence was that before the Justices of the Peace, and the jury could not have been misled with regard to the fact that the Court referred to the action of the Justices.

In the case before Justice Reppy, the defendant Dodd was not present; the discharge of the plaintiff, therefore, by him, could not have been evidence of want of probable cause, or of any other fact than the institution and termination of the prosecution, but at the examination before French he was present and examined as a witness. If, therefore, the discharge by a Justice under such cir-

cumstances is *prima facie* evidence of want of probable cause, the charge to this extent would be correct as applicable to the first cause of action in the complaint. The paper book does not purport to set forth the entire charge of the Court, nor any other portion of it than that quoted and excepted to, nor does it give the connection in which this was used. In this the Court uses the definite article referring evidently to one particular discharge, and from all the circumstances we are satisfied that the portion of the charge excepted to applied to the discharge by Justice French. We come, then, to the correctness of the charge. •

That malice may be inferred by the jury from want of probable cause, is a principle which is too well settled to admit of argument. *Burley vs. Bethune*, 5 Taunt., 583; 2 Stark. Ev., 684; 2 Greenl. Ev., Sec. 453; *Stone vs. Crocker*, 24 Pick., 87, and authorities cited.

Is a discharge on the merits after an examination by the Justice such evidence of want of probable cause as will authorize the jury to infer malice? This is a much more delicate and doubtful question. Actions for malicious prosecution are not to be encouraged, as they tend to prevent prosecutions for crimes, and the law looks upon them with a jealous eye. But no greater injury can be inflicted on an innocent man than a prosecution for a criminal offence, and when the process of law is perverted by a malicious heart, through a groundless prosecution, to the infliction of such an injury, every principle of justice and humanity demand its redress.

To establish want of probable cause is to prove a negative; the same degree of proof, therefore, is not required as to prove an affirmative proposition; but slight evidence will generally be sufficient. 1 Am. L. Cases, 223, and authorities cited.

On an examination before a magistrate who has power only to commit or discharge, if it appears that there is *probable cause to believe* that an offence has been committed and that the party charged therewith is guilty, it is the duty of the magistrate to hold the party to trial or commit, otherwise he must discharge. In case of a discharge, therefore, the inference is that there is not

probable cause to believe either the commission of the offence or the guilt of the party charged. In the case of an acquittal on a trial by jury it is altogether different; there the guilt of the defendant must be established beyond all reasonable doubt. All the authorities agree that an acquittal by a jury is not evidence of want of probable cause, and the same rule obtains where a defendant is discharged by a magistrate for want of prosecution, as in the case before Reppy. But the authorities differ as to whether a discharge by a magistrate after examination is *prima facie* evidence of want of probable cause. There are certainly respectable authorities which hold that a discharge under such circumstances is *prima facie* evidence of that fact. 1 *Am. Lead. Cases*, 223, and authorities cited; 2 *Greenl. Ev.*, Sec. 455, and authorities cited. In the case at bar, however, it appears from the testimony of the defendant that he personally witnessed the commission of the crime charged against the plaintiff; the circumstances are stated as of his personal knowledge and testified to positively; he was examined before the magistrate and was the only witness for the prosecution. Under such circumstances it is difficult to see why a discharge of the defendant by the magistrate should not be *prima facie* evidence of want of probable cause. Without going to the extent that in all cases a discharge by a magistrate is to have this effect, we are of opinion that where as in this case all the facts in regard to the commission of the crime charged are stated as within the personal knowledge of the defendant, and he is examined before the magistrate by whom the party charged with the crime is discharged, such discharge is *prima facie* evidence of want of probable cause. 9 *East*, 362, *Nicholson vs. Coghill*; 4 *Barn. & Cres.*, 21, 23.

The calling witnesses for the defence on the examination does not affect the discharge as evidence, for all the evidence is to be considered to determine whether there is *probable cause*. "The prosecutor may have sworn to the truth of the charge, but that will not show that he had a probable cause for it." 5 *Taunt.*, 583, *Burley vs. Bethune*.

The question of probable cause is not by this portion of the vol. x.—47

charge left to the jury. That is a distinct question. We see no error therefore in the charge of the Court as applied to this case.

The affidavit offered on the hearing of the motion for a new trial was properly rejected by the Court. It was both incompetent and immaterial.

The jury are the proper judges of the amount of damages to be allowed in actions of this kind, and unless there is something in the case showing that the jury in their determination were influenced by passion, prejudice or some improper motive, the Court will not interfere to disturb their verdict. *Chamberlain vs. Porter, 9 Minn.*, 269. We see nothing in this case to call for our interference.

The order denying a new trial is affirmed.

THOMAS HARRINGTON vs. ARPHAXED LOOMIS et al.

The rule as to the requisites of affidavits for publication of summons, laid down in *Mackubin & Edgerton vs. Smith, 5 Minn.*, 267, applied and followed.

In August, 1859, defendant, Arphaxed Loomis, commenced a suit in the District Court for Olmsted county, against plaintiff and one Stephen Breden. An order was procured for the service of the summons by publication, upon affidavits, and the summons was so served. On the 14th day of October, 1859, judgment was entered on failure to answer, in favor of the plaintiff in said action; execution was issued and the real estate of said Harrington sold thereunder to Hiram T. Horton. The plaintiff, Thomas Harrington, commenced this action against said Loomis and Horton to set aside said judgment, as to himself, and all proceedings thereunder. The defendants in this action answered and plaintiff replied, and the issues thus formed were tried before the Court,

without a jury, and the Court found and decided that the Court never acquired jurisdiction of the person of Harrington in the said former action, by reason of the insufficiency of the affidavits of publication, and judgment was rendered in favor of the plaintiff, from which judgment the defendants appeal to this Court. The contents of the said affidavits sufficiently appear in the opinion of the Court.

SMITH & GILMAN for Appellants.

L. BARBER for Respondent.

By the Court—BERRY, J.—On the 14th day of October, 1859, a judgment on failure to answer was entered up in the District Court for Olmsted county, against Harrington and one Breden, in favor of Arphaxed Loomis.

The summons in the action was served by publication, as upon non-resident defendants. Harrington did not appear. Execution was issued upon the judgment, and real estate of Harrington sold thereunder to the appellant Horton. The present action is brought by the respondent to set aside the judgment as to himself, and all proceedings under it, and by the judgment of the Court below this relief was granted. From this latter judgment an appeal is taken to this Court. To dispose of the case it is only necessary to consider one point.

As a prerequisite to the granting of an order for publication of summons in an action against a non-resident defendant, the statute in force when the order in question was granted required that it be made to *appear* by affidavit that “after due diligence the defendant cannot be found within the” State. The affidavits of Leonard and Head are relied upon as a compliance with this requirement of the statute. Neither of these affidavits contains a positive averment of the place of residence of Harrington.

The affidavit of Leonard states “that he has seen and read a letter received by mail by his, this deponent’s, law partner, *within a few days past*, having the post mark of the post office at

Mount Helicon, Franklin county, Missouri, and dated at that place, and *purporting* to have been written at that place by the defendant, Thomas Harrington; that this deponent's law partner is the agent of both said defendants, and said letter last mentioned as so received was directed to him and concerned the said Harrington's business in this county, and this deponent verily believes that said Harrington wrote the same, and that he is now at Mount Helicon aforesaid."

This affidavit does not identify Harrington's hand writing, nor are the facts stated at all inconsistent with Harrington's residence or presence in this State at the date of the affidavit.

The affidavit of Head states "that the defendants in this action cannot be found after due diligence within this State, that he has made diligent inquiry, and learns, and is informed and believes that Thomas Harrington resides and is now at Mount Helicon, Franklin county, Missouri."

The other affidavit of Head adds nothing substantial.

We deem it unnecessary to discuss the merits of these affidavits. They are clearly insufficient to confer jurisdiction to grant the order for publication within the rule laid down in *Mackubin and Edgerton vs. Smith*, 5 Minn., 317. That case was decided while the law under which the order in this case was granted, and which is now substantially changed, was in force. We simply follow the decision there made to the extent of holding that in consequence of the insufficiency of the affidavits to confer jurisdiction to grant the order of publication, the publication of the summons did not give the Court jurisdiction of the person of Harrington, and so the judgment and subsequent proceedings were properly set aside.

Judgment affirmed.

R. F. CROWELL VS. E. C. LAMBERT.

The Supreme Court has authority to issue the peremptory writ of mandamus.

A County Auditor may act by deputy in the canvass of votes.

Where, upon the canvass of votes cast at a general election, C. was declared duly elected to the office of Judge of Probate, received a certificate, qualified as by law required, and made a demand upon his predecessor for the books, &c., of the office, it appearing that L.'s term of office had expired; *Held*—that upon the refusal of L. to deliver up the records, C. was entitled to a peremptory writ of mandamus to enforce the delivery.

APPLICATION FOR A PEREMPTORY MANDAMUS.

The petitioner, R. F. Crowell, claimed to have been duly elected to the office of Judge of Probate for Ramsey County, at the general election of 1864, by a majority over his competitor, E. C. Lambert, then the incumbent of said office, and whose term of office expired on the first day of January, 1865. A certificate of election in due form was issued to R. F. Crowell, signed by the *deputy* of the County Auditor, and Crowell in due season filed his oath of office, and executed a proper bond with surety as required by the statute. After the expiration of the term of office of Lambert, Crowell demanded the books, papers, &c., appertaining to the office of Lambert, who refused to deliver them to him. Lambert also in due time gave notice of contest of the election of Crowell, which was pending at the time of the application for the mandamus.

The petition set up the facts showing Crowell's title to the office, and the demand and refusal to deliver up the books, papers, &c., to him. To the petition were attached the original return or

certificate of election issued to Crowell, and copies of the oath of office, bond, &c., as exhibits, all of which was sworn to. Upon which an order was obtained and served on Lambert to show cause why a peremptory mandamus should not issue as prayed.

Counter affidavits were interposed by Lambert controverting the election of Crowell, and setting up the contest still pending. The authenticity of the certificate of election, however, was not denied, but claimed to be invalid, because signed by a deputy and not by the principal officer himself. The fact that a general election had been held, that Crowell had duly qualified and made the demand as stated, and the refusal to comply therewith, was not denied; but it was claimed that the contest pending, suspended or stayed the right of Crowell to take possession of the office until the contest should be determined, and that the title of Crowell to the office as set up in his petition was so far controverted by the counter affidavits, as to forbid further proceedings on the part of the Supreme Court.

The counsel for the respondent also made a preliminary motion to dismiss the proceedings upon an alleged defect of jurisdiction, which was argued in connection with the argument on the merits.

H. J. HORN for the Petitioner.

I.—The mandamus in this case is authorized under *Sec. 4, of Chap. 73, Pub. Stat., page 632*, to compel the performance of a duty resulting from an office. *Sec. 4, Chap. 7, Pub. Stat., 165.*

II.—Although the defendant has studiously attempted to put in issue the title set up by Mr. Crowell to the office, he does not controvert the *genuineness or authenticity of the original certificate of election* of Mr. Crowell annexed to the petition. This certificate is sufficient in form and substance, is under the seal of the County Auditor, and attested by the County Auditor acting by his deputy. He does not controvert the fact that Mr. Crowell entered into bond and took the oath of office.

He does not controvert the demand made upon him, and his refusal to deliver the books, &c., or that he has possession thereof.

He in one place denies that a canvass was made of the vote, and in another place admits that a canvass was made, but alleges it was made by unauthorized persons without stating what officers made it, or the facts by which the Court might judge of the regularity (if necessary) of the canvass.

He again admits the authority of the canvassing board to act, by the fact of his having appealed from its decision and contested the election.

The facts not controverted by the defendant are sufficient to call for the issuance of the writ.

III.—The return or certificate of election of Mr. Crowell is valid on its face, and issued by the proper officer. *Sec. 32, Chap. 15, Session Laws of 1861, pages 108, 109; Sec. 57, Chap. 2, Session Laws of 1860, page 65.*

The attestation by the Deputy County Auditor is sufficient. The County Auditor having authority to appoint a deputy, and being but a ministerial officer, (*Secs. 7, 9, 25, of Chap. 2, Session Laws of 1860, pages 54, 58,*) clearly recognizes the authority to appoint a deputy.

IV.—The official return is conclusive of the right in Crowell to the office until it is set aside by due course of law, and the contest of the election does not stay or suspend this right. *Secs. 136, 235, 231, 240, Cushing; People vs. Stevens, 5 Hill, 621, and authorities cited.*

The mode of contesting the election of Judge of Probate is essentially the same as contesting that of a member of the Legislature, except that the former is in the nature of an appeal to the District Court, the latter to the Legislative body. There is nothing in the statute staying or suspending the entry into office of the officer or member returned. *Secs. 31, 49, 52, Chap. 15, Session Laws of 1861, pages 108, 114, 115.*

It cannot be pretended that the Legislature intended to change the well settled rule, that a member of the Legislature returned and qualified is entitled to his seat pending a contest, and until the return is set aside by the course of law—for otherwise every mem-

ber elect of the Legislature might be prevented from taking his seat during the session of the Legislature by a contest.

The statute, it will be observed, draws no distinction whatever between the case of the contested election of a member of the Legislature and that of Probate Judge, which, therefore, must be governed by the same rule.

V.—The said defendant shows no right to the office. It appears that the term of his office commenced not later than the 1st of January, 1863, having been elected in the fall of 1862. His term being but for two years, (not two years and until a successor is qualified), (*sec. 7, art. 6, State Constitution, 44*), expired on the first of January, 1865. He claims to have been elected, but he does not claim to have been *returned* as elected, nor does he hold a certificate of election, nor has he qualified. If, therefore, the contest suspends Mr. Crowell's right to the office, there would be a vacancy, for Mr. Lambert shows no present right. Nay, more, the contest might possibly be protracted by appealing the decision of the District Court to the Supreme Court, during a full term of office, leaving the office vacant during the whole term. Such a result certainly was not contemplated by the Legislature.

By the Court—BERRY, J.—This was an application for a peremptory mandamus. [A motion was made on behalf of the defendant, Lambert, to dismiss the proceedings on the ground that this Court had no jurisdiction to issue the writ of mandamus save to a District Court or District Judge. *Section 2, Art. 6, of the Constitution* declares that the Supreme Court “shall have original jurisdiction in such remedial cases as may be prescribed by law, * * * * but there shall be no trial by jury in said Courts.” Section 5 of the same article provides that “the District Courts shall have original jurisdiction in all civil cases, both in law and equity,” &c. In both cases the jurisdiction conferred is *original*, and so the word “original” cannot be used in the sense of exclusive. By *Sec. 4, page 475, Pub. Stat.*, the Supreme Court is empowered to issue writs of mandamus to all courts of inferior juris-

diction, and to individuals, &c. *Sec. 17, page 633, Pub. Stat.*, enacts that "the several District Courts of this Territory shall have original jurisdiction in cases of mandamus," &c. Under this state of the law it is clear that the Supreme Court possessed jurisdiction concurrently with the District Courts over mandamus proceedings, except that there could be no trial by jury in the Supreme Court. See *Harkins vs. Board of Supervisors of Scott Co.*, 2 *Minn.*, 342. And here again it is to be noticed that the word "original" in section 17 above cited, was not intended to confer exclusive jurisdiction on the District Courts, because in sections 12 and 13 of the same chapter the authority of the Supreme Court to issue writs of mandamus is expressly recognized. But the defendant contends that the power of the Supreme Court in matters of this nature, depending as it does under the Constitution wholly upon legislation, has been cut off by *Chap. 18, page 71, Laws of 1862*. This chapter takes away in terms from the Supreme Court the right to try an issue of fact raised in a mandamus proceeding, or to order the trial of such issue by a jury. In the view taken by the Court in the case cited from 2 *Minn.*, this had already been done by the Constitution. But *Sec. 3 of the act of 1862* goes on to provide that "the several District Courts of this State shall have original jurisdiction in all cases of mandamus, except in cases where such writ is to be directed to one of said District Courts or a Judge thereof in his special capacity, in which case the Supreme Court shall have jurisdiction," &c. The counsel for the defendant insists that here the word "original" is used in the sense of *exclusive*. We perceive no reason why the word should be taken in that sense here any more than in the Constitution or the public statutes, where, as we have already shown, it certainly cannot have that meaning. In our view the main purpose of the act of 1862 was to make the statutes correspond in reference to the trial of issues of fact by the Supreme Court with the provision of the Constitution and the decision in 2 *Minn.* before referred to, and in addition to point out with more particularity what proceedings should be had where a mandamus was issued by the Supreme Court to a District Court or

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Judge. If it had been the intention of the Legislature to deprive this court of the general power to issue the writ except when directed to a District Court or Judge, this might have been done directly in a very few words. But we find nothing to this effect. The motion to dismiss was accordingly overruled.

To come to the merits of the controversy, it appears that the defendant, Lambert, was elected to the office of Judge of Probate for Ramsey county, at the general election in 1862, that his term of office commenced as early as the first day of January, 1863, and expired as soon as the first day of January, 1865. The Constitution declares that Judges of Probate shall be elected for the term of two years, while it does not provide that a Judge of Probate shall hold his office until his successor is elected and qualified, as in the case of Judges of the Supreme Court. 9 *Minn.*, 283; 8 *Abb. Pr. R.* 359. Under this state of facts it would seem that from the time when Lambert's term expired under his election in 1862, and until his successor was inducted, there was *de jure* a vacancy in the office. Upon the election in 1864 Lambert was not returned as elected, nor was any certificate issued to him, nor does he appear to have qualified. On the other hand, it is alleged in the petition, and not denied by the defendant, that there was a general election held in 1864, in and for the county of Ramsey, and also in general terms that the vote was canvassed (without stating by whom), and that the petitioner was returned as having received a majority of votes cast for the office of Judge of Probate. The defendant in his affidavit admits that there was a canvass made by "three unauthorized persons, neither of whom," in his own language, "was the County Auditor or a Justice of the Peace of said county, taken to the assistance of the County Auditor by the County Auditor," who assumed to act as a County Canvassing Board and declared Crowell elected at the close of their canvass. Now all that is contained in this denial might be true construed together, and yet the canvass might have been made by the deputy County Auditor and two competent Justices of the Peace taken to his assistance. The plaintiff deposes that the certificate of election which is set out *in haec verba*, was issued to him. That

certificate was signed by the County Auditor by his deputy, and the seal of the County Auditor affixed. The defendant denies "that any such alleged certificate was ever tested or signed by the County Auditor of said county under the seal of said County Auditor or otherwise." This is not a denial of the allegation of the petition that a certificate was issued to him signed and sealed by the County Auditor by his deputy. The sufficiency of the averments of the petition in this regard depends upon the authority of a County Auditor to act by deputy in such cases. The duties of the Auditor so far as this case is concerned are purely ministerial, and there is no inconsiderable authority for the doctrine that in the absence of statutory prohibition a "ministerial office may be executed by deputy." 2 *Bl. Com.* (36); *Blackwell on Tax Titles*, 443; *Bouvier's Law Dic.*, 447, *Title, Deputy*. But aside from this the office of deputy County Auditor is expressly recognized in *Secs. 7, 9 and 25, Chap. 2, Laws 1860*, and there is no statutory limitation of his power. It is also stated in the petition, and not denied in the affidavit of the defendant, that Crowell qualified as required by law, and that he made a proper demand of the books, papers, &c., belonging to the office of Judge of Probate.

We think that the other allegations of the petition which are denied by the defendant may be regarded as surplusage.

On the facts appearing from the petition as to which no issues are properly raised, we conclude that the plaintiff is entitled to the writ of peremptory mandamus. Some points were made by the defendant which we do not deem it necessary to dwell upon. On the whole it may be said that the question here is not who will be entitled to the office on an examination into the merits of the election, but who is *now* entitled to the possession of the books and papers appertaining to the office. The person holding the certificate is, under the circumstances of the case, *prima facie* the officer, and therefore *prima facie* entitled to the insignia and records of the office. In such cases the writ of mandamus is a peculiarly proper, adequate and speedy remedy, and perhaps the only one by which to enforce the delivery of the books, &c.

We do not deem it necessary to point out the inconveniences resulting in some cases in a total denial of justice, which would follow if a party situated as the plaintiff is in this case, were compelled to await the result of the election contest provided for by statute—a contest which might be prolonged until the term for which he was elected had expired. The conclusions to which we have arrived are abundantly sustained in *The People vs. Head*, 25 Ill., 325, a case which presents a remarkable analogy to the case before us, both in its facts and in the questions raised upon the trial. See also *Jones vs. Kilduff*, 15 Ill., 502; *People vs. Hilliard*, 29 Ill., 414; 21 Pick., 151.

Peremptory mandamus awarded.

***F. A. W. DAVIS vs. ALLEN PIERCE et al.**

The plaintiff having the legal title to a tract of land on which there were two mortgages, purchased and took an assignment of the first. The Judge who tried the cause below, found as a matter of fact, that the plaintiff did not, in taking the assignment of said mortgage, intend either that it should be extinguished or merged, or that it should not remain a valid or first lien upon the premises therein described; and also found that it was for the interest of the plaintiff that said mortgage should remain a lien. *Held*—That the estate or interest thus purchased by the plaintiff did not merge in the legal estate.

This action was commenced in the Ramsey County District Court. At the trial a jury was waived and the cause tried before the Court. The facts as found by the Court are substantially as follows: The defendant, Allen Pierce, sold a large amount of real estate in Ramsey County to the plaintiff, and conveyed the same by two separate deeds, one dated May 22, 1855, and one

*Mr. Justice McMillan being of counsel for some of defendants, took no part in the hearing and decision of this cause.

April 30, 1856. A portion of the lands so sold and conveyed was subject to two mortgages, prior both by date and record to either of said deeds; the first mortgage executed to one Asa Marsh, dated and recorded September 16, 1854; the second to one D. W. Marr, dated and recorded December 22d, 1854. On the 20th day of May, 1856, the said Marsh mortgage and the debt secured thereby, were purchased by plaintiff and duly assigned and transferred to him, and such assignment was then duly recorded. On the 3d day of November, 1855, the said Marr mortgage and the debt secured thereby, were duly assigned and transferred to Carlos Wilcox and Daniel R. Barber, and such assignment was then duly recorded. This action was brought by the plaintiff against said Pierce, Wilcox, Barber and others to foreclose said first or Marsh mortgage. It is alleged in the answer of Wilcox and Barber, that plaintiff procured the assignment of the Marsh mortgage "for the purpose and with the intent to discharge the lien and incumbrance thereof from his said real estate," and it is claimed therein that his title as assignee of the first mortgage is merged in the legal estate acquired under said deeds. The reply took issue upon such allegation. Upon the trial the Court further found as a matter of fact "that in making said purchase and in taking the assignment of the Marsh mortgage and note, it was not the intention of said Davis (plaintiff,) that said mortgage should thereby become extinguished, or merged, or that the same should not remain a valid and subsisting first lien upon the premises therein described; that it was and is for the interest of the said Davis that the said Marsh mortgage should remain a valid and subsisting lien upon the premises therein described and be foreclosed as such." The Court ordered that the usual judgment and decree of foreclosure be entered. Judgment was entered pursuant to such order. The defendants, Wilcox and Barber, appeal from such judgment to this Court.

D. COOPER for Appellants.

VAN ETEN & OFFICER for Respondent.

By the Court—WILSON, C. J.—The only question in this case is whether in the purchase of the Marsh mortgage by the plaintiff, the estate or interest thus acquired merged in the legal estate.

In equity where the legal and equitable estates become united in the same person the equitable is merged in the legal, unless the party in whom they meet intends to keep them separate, (which intention must be just and injurious to no one,) and where no such intention is expressed it will be presumed if it is for the interest of the party in whom the estates meet. *Wilcox & Barber vs. Davis*, 4 *Minn.*, 197; *Starr vs. Ellis*, 6 *John. Ch.*, 395; *Forbes vs. Moffatt*, 18 *Ves.*, 384; *Cleft vs. White*, 2 *Ker.*, 536; 4 *Kent's Com.*, 102; *James vs. Morey*, 2 *Conn.*, 246. The question here then is one purely of intention declared or presumed. The Judge who tried the cause below has found as a matter of fact that the plaintiff did not in taking the assignment of said mortgage, intend either that it should be extinguished or merged, or that it should not remain a valid or first lien upon the premises therein described, and has also found that it was for the interest of the plaintiff that the mortgage should remain a lien.

To this finding the defendants' counsel objects, (1), that it does not show affirmatively that the plaintiff intended to keep said mortgage lien alive; (2), that it was not competent for the plaintiff to prove or for the Court to find that it was for the plaintiff's interest to keep the estates separate, that fact not having been alleged; (3), that it is not the province of the Court in any case to find as a fact that it is for the plaintiff's *interest, &c.*, but that the facts must be found from which this is inferred.

It is true that in this finding it is not affirmatively and positively stated that in taking the assignment plaintiff intended to keep alive the lien; but from the facts found the Court was authorized and bound to presume such intention. *See authorities above cited.*

If there was any error, therefore, in the finding in that respect it was technical and formal merely, and should be disregarded. An averment of the plaintiff's interest in keeping alive the lien, was not necessary in order to justify the reception of evidence of that fact.

Paquin v. Braley.

The interest of the plaintiff was shown merely as *evidence* of his intentions—it being presumed that he intended to act in accordance with his interest.

With reference to defendants' third objection, even if we should regard the finding of the Court as the finding of a legal conclusion rather than of facts, it would not be a fatal error—as the facts from which this is inferred are all found by the Court.

The evidence, we think, was clearly sufficient to justify the finding.

Judgment below affirmed.

*FELIX PAQUIN vs. JOHN B. BRALEY.

P. mortgages to B. a forty acre tract and subsequently conveys to S. two and a half acres of said tract. B. afterward, and with full knowledge of the conveyance to S., forecloses the mortgage by advertisement, in pursuance of the power of sale contained in the mortgage, and sells the premises *as one tract*. *Held*—not to be error.

In pursuance of the power of sale in a mortgage, B. (a mortgagee) advertised for sale the mortgaged premises, and the sheriff, acting as his agent, at the time and place fixed, offered said premises for sale, and B. bid them off for \$500. After the sheriff had sold certain other lands, and in fifteen or twenty minutes after the *first* sale, he *re-offered* the premises first sold, and they were again bid off by B. for \$542.26. *Held*—That the power of the sheriff or B. to sell was exhausted by the first sale, and therefore the second sale was a nullity.

This action was brought in the District Court of Rice County, to set aside certain mortgage foreclosure sales, &c. The cause was tried by a jury and a special verdict rendered therein. The facts as they appear in the pleadings, and as found by such ver-

* This cause was argued and submitted before the election of Mr. Justice Berry.

dict are substantially as follows: In July, 1857, one Norbert Paquin was the owner of the s. w. quarter of s. w. quarter, sec. 29, T. 110, R. 20, (40 acres); also the s. e. quarter, sec. 19, T. 110, R. 21, and s. e. quarter, sec. 23, T. 110, R. 22, in Rice county. In July 1857, he mortgaged the first described lands (40 acres,) to the defendant Braley for \$2,000, and in October, 1857, the other lands to defendant for \$400. In August, 1858, he conveyed 2½ acres of said forty acre tract to Breck and Sanford, and in March, 1859, conveyed his interest in the mortgaged premises to the plaintiff. Both of said mortgages were foreclosed by advertisement, and the premises struck off and sold to defendant on the 21st September, 1859. At the sale the lands mentioned in the second mortgage, (except 80 acres which had been previously released,) were first sold to the defendant for \$500, and the lands mentioned in the first mortgage (40 acres,) were sold to the defendant *as one parcel* for \$1,888.15. After said last mentioned sale, the premises first sold were re-offered for sale and sold a second time to the defendant for the sum of \$542.26. The plaintiff was present at the sale, and demanded that the 40 acres should be sold in separate parcels. The defendant had notice of the conveyance of said 2½ acres to Breck and Sanford. The plaintiff also objected to said second sale. The jury found the value of the 40 acres at the time of the sale as follows, to-wit: 37½ acres at \$45 per acre, the 2½ acres at \$60 per acre, making in the aggregate, \$1,692.50, and the value of the other lands, \$2.50 per acre. Upon the special verdict the Court directed judgment to be entered for the defendant, refusing to set aside either of said sales. The plaintiff sues out a writ of error and removes the cause to this Court.

BATCHELDER & BUCKHAM for Plaintiff in Error.

BERRY & PERKINS for Defendant in Error.

By the Court—WILSON, C. J.—Norbert Paquin being the owner of the following described premises mortgaged to the defendant, (1), the s. w. quarter of s. w. quarter, sec. 29, T. 110, R. 20:

(2), s. half of s. e. quarter, sec. 19, and s. e. quarter of sec. 23.

Subsequently in August, 1858, he conveyed to J. Lloyd Breck and D. P. Sanford, $2\frac{1}{2}$ acres lying in a square form in the n. e. corner of said s. w. quarter of s. w. quarter of sec. 29, and in March, 1859, he conveyed the whole of said mortgaged premises (except said $2\frac{1}{2}$ acres,) to the plaintiff.

In August, 1859, the defendant in pursuance of the power of sale contained in said mortgages, advertised the premises for sale and in September, 1859, sold them as follows :

At the mortgagee's sale the Sheriff who acted as the agent of defendant in making the sale, first offered the premises described in the second mortgage aforesaid, and the defendant bid them in for the sum of \$500, that being the highest sum bid therefor.

The Sheriff next offered *as one lot or tract* the premises described in the first mortgage, (s. w. quarter of s. w. quarter of sec. 29,) which the defendant also bid off—the Sheriff and defendant at the time of sale knowing that Breck and Sanford were the owners of $2\frac{1}{2}$ acres of the tract.

After this the Sheriff *re-offered* the premises first sold, and they were bid off by the defendant for the sum of \$542.26. This sale was fifteen or twenty minutes after the first sale of the same premises.

On the facts two questions are presented to the Court: First, whether it was error in the defendant to offer and sell the premises described in the first mortgage *as one tract or lot*?

Second, whether the Sheriff had any power to *re-offer* or *re-sell* the premises described in the second mortgage?

As to the first question it will be observed that it is not whether Breck and Sanford or the plaintiff could in a court of equity have compelled the defendant to sell in the subdivision existing at the time of sale. Breck and Sanford here ask for no relief, and the plaintiff does not show that the course pursued was inequitable or prejudicial to his rights. It is simply a *legal* question whether the sale of said 40 acre tract *in one parcel* was in contravention of the statute and *therefore* void.

The Court are unanimously of the opinion that there was no
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error in the course pursued in the sale of that tract. The majority of Court consider that the *mere sale* to Breck and Sanford did not make said 2½ acres a "*distinct tract or lot*" within the meaning of the statute. I think that where lands mortgaged as one tract or lot, are subsequently cut up into lots, the mortgagee upon a foreclosure of the mortgage under the statute is not bound to advertise or sell in parcels unless so ordered by a court of equity, and on this ground I concur with my brethren in the opinion that there was no error in the sale of this tract.

As to the second question presented we are clearly of the opinion that the power of the Sheriff (or defendant,) to sell was exhausted by the *first* sale.

The duties of the Sheriff in making the sale were merely ministerial. He had no right to disregard or power to set aside a prior sale. The second sale was therefore a nullity.

The cause is remanded to the Court below with instructions to modify its judgment in accordance with this opinion.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF MINNESOTA.

JULY TERM, 1865.

JOHN DORMAN vs. JOHN P. BAYLEY.

(On an appeal from a Justice of the Peace, none of the appeal papers are subject to a stamp duty.

This action was commenced before a Justice of the Peace in Scott County, and judgment rendered in favor of the plaintiff. The defendant appealed to the District Court of that county. When the 'cause came on to be heard, the plaintiff moved the Court to dismiss the appeal on the ground that there should have been a "U. S. Revenue Stamp of the denomination of 50 cents, attached to some one of the appeal papers; and that as there was no such stamp attached, the appeal was ineffectual and void." The Court held that such stamp was necessary and that it should be attached to the affidavit filed for appeal, and granted the motion. The defendant appeals from the order granting the motion to this Court.

BROWN & PECK for Appellant.

HENRY HINDS for Respondent.

By the Court—WILSON, C. J.—This case presents the simple question whether an appeal from a Justice of the Peace under our statute is ineffectual and void if none of the appeal papers is stamped. In schedule B of the Internal Revenue law of 1864, are specified as subject to a stamp duty of fifty cents each, the following instruments or papers: "Writs or other process on appeal from Justices' Courts or other Courts of inferior jurisdiction to a Court of Record." This is the only law now in force requiring a stamp on such papers. The language here used: writs or *other* process, and its application to legal proceedings, show that the word process is used in its legal sense.

Is any one of the appeal papers a writ or other process? If so it must be either the affidavit or recognizance required as a condition precedent to the allowance of the appeal, or else the return of the appeal papers by the Justice—for no other paper is required in taking such appeal. The Court below held that the stamp should be attached to the affidavit. The respondent's counsel seems to think that the return is the process. If either one of these papers is designated "process," it must be for the purpose of making the revenue law applicable to this class of cases, for neither etymological propriety nor usage, authorizes such use of the term. Process is so denominated because it *proceeds* from a Court. *Bouv. Law Dic.* It is a generic term applied in practice to the several writs issued in an action. 3 *Black. Com.*, 279, 292; *Stephen on Pl.*, 21, 22; *Knapp vs. Pults*, 3 *How. P. R.*, 53, *per Harris, J.*; *Bouv. Law Dic.* A summons by which a suit is commenced in the District Court is designated process, though it does not issue out of the Court, but it serves the purpose and is in the nature of process, and therefore may with propriety be so termed. If any one of these appeal papers is process, then that clause of our State Constitution, which requires that the style of

all process shall be "The State of Minnesota," has never been understood.

We think it beyond a doubt that neither the affidavit, recognizance or return is process, or in the nature of process. But even if this was a matter of doubt—the stamp should not be required, for a tax or duty can only be imposed by clear and express words for that purpose. All acts imposing duties are to be construed as not to make any instrument liable to them unless manifestly within the intention of the Legislature. *Tompkins vs. Ashly*, 6 B. & C., 541; *Gun vs. Sculds*, 11 Exchq. R., 190; *Wroughton vs. Tuttle*, 11 M. & W., 566; *Morrefold vs. Diamond*, 4 B. & C., 242; *Warrington vs. Warrington*, 8 East, 242. A strict construction of our revenue act is peculiarly incumbent on the Court, because its violation is followed by severe penalties. The rule that penal statutes shall be strictly construed, has its foundation in reason and justice, and is too well settled to admit of doubt or require the citation of authorities to support it.

If the affidavit is the paper required by law to be stamped, then a stamp on the return is insufficient and *vice versa*. The stamping of a wrong paper might be evidence that the party did not intend to defraud the Government, but it would not be a compliance with the law. See *Rex vs. Weeks*, *Strange R.*, 716; *Williams vs. Stoughton*, 2 Starkie, 292. It is the instrument that is subject to the stamp duty and not the act of appealing. We think the act properly construed does not require a stamp on any of these papers.

There is we presume a *casus omisus*, but if so it cannot be supplied by judicial interpretation.

The order appealed from is reversed.

JOHN SULLIVAN VS. THE LACROSSE AND MINNESOTA STEAM
PACKET COMPANY.

A summons can only be served on a foreign corporation by publication.

Service on the President or managing agent of such corporation within the State is a nullity, and confers no jurisdiction on the Court, and in such case the defendant may maintain a writ of error to reverse the judgment.

This action was brought in the District Court of Dakota county. The only service of the summons was by the Sheriff of Ramsey county, whose return is as follows: "I certify and return that I have on the 3d day of May, A. D. 1865, served the within named summons on the within named LaCrosse and Minnesota Steam Packet Company, by delivering personally to William F. Davidson, the president and general agent of the within named defendant, a true and correct copy thereof in my county." It is alleged in the complaint that "the defendant is and ever since the first day of August, 1864, has been a corporation formed and existing under and by virtue of the laws of the State of Wisconsin, under the corporate name and style of 'The LaCrosse and Minnesota Steam Packet Company,' for the purpose of conducting the business of a transportation company of passengers and freight, and as such during the time aforesaid, and up to and including the 4th day of November, 1864, was engaged in such business upon the waters of the Mississippi in this State and elsewhere," which time includes the time when the cause of action set out in the complaint accrued.

No appearance in the action was made by or in behalf of the defendant. At a special term held on the 6th day of June, 1865, the cause was referred to a referee "to try the issues of fact in said action and report a judgment thereon." The referee after-

wards made his report, finding the facts and as a conclusion of law, that the plaintiff was entitled to recover of the defendant the sum of \$1,000 damages. Judgment was thereupon entered for \$1,000 and costs against defendant. The defendant sued out a writ of error and removed the cause to this Court.

ALLIS & WILLIAMS for Plaintiff in Error.

Judgment was erroneously entered by the District Court, because—

First—It appears by the complaint that defendants are a foreign corporation, and it does not appear by the complaint or otherwise, that they have any property within this State, or have any agency established therein for the transaction of their business. Thence it does not appear that they are subject to the jurisdiction of said Court. *Comp Stat., sec. 37, page 629.*

Second—But even supposing defendants were properly *subject* to the jurisdiction of said Court, yet it appears that no service of the summons was ever made on the defendants.

The defendants, being a foreign corporation, the summons must be served by publication.

Service upon the president of a corporation outside the jurisdiction creating the corporation is no service. *Broome et al. vs. G. D. D. & M. Packet Co., 9 Minn., 239; Comp. Stat., sec. 5, p. 605; Id., sec. 50; Angell & Ames on Corporations, p. 395, sec. 11, et seq.; Sess. Laws 1864, p. 90; Hurlbert vs. Hope Mut. Ins. Co., 4 How. Pr., 275, 415; Brewster vs. Mich. C. R. R. Co., 5 Id., 183.*

Third—But assuming that defendants were subject to the jurisdiction of said court, and had been duly served with summons, yet the judgment was erroneously entered. The last sentence of *clause 1 sec. 165, page 555*, prescribes the mode of entering judgment by default in such cases. Under these provisions the Court was authorized, doubtless, to have the damages assessed by a reference; but the Court was not authorized to make a reference "to try the issues of fact in said action, and report a judgment

thereon." This action of the Court was wholly without warrant in our statutes, or the practice of our Courts. And when judgments are taken by default, the provisions of law authorizing the same must be pursued.

The Court might have referred the case to a referee to assess the damages, but not "to report a judgment."

And no judgment was ever, in fact, ordered by the Court in this case.

The judgment, therefore, which was entered, is wholly without warrant, and absolutely void.

SMITH & GILMAN for Defendant in Error.

In the case of *Broome et al. vs. The G. D. D. and M. Packet Co.*, 9 Minn. R., 243, this Court held that under Sec. 5, page 605, of our statutes, the provisions of our statutes as to commencing suits against corporations applied to foreign as well as domestic corporations.

The statute for commencing suits against corporations, (Sec. 53, page 538,) provides that the summons may be served by delivering a copy to the president, secretary or managing agent. In the case at bar the Sheriff's return shows that the summons was served by delivering a copy to the president and managing agent. It seems to us that this settles the question as to the sufficiency of the service.

Furthermore, we submit that in suing out the writ of error, the plaintiff in error has come into Court, and being in Court, cannot object to the sufficiency of the service of the summons. The appearance waives all defects of service, &c., unless the appearance be special.

Again, if the error as to service is well founded, the party should first ask relief in the Court below by motion to vacate and set aside the judgment. *Babcock vs. Hollinshead*, 3 Minn., 141.

Under Sec. 173, page 555, of statutes, it was competent for the Court to appoint a Referee to assess the damages or ascertain the amount the plaintiff was entitled to recover, and upon such report

Sullivan v. La Crosse & Minnesota Packet Company.

of the Referee it was the duty of the clerk to enter the judgment under *Sec. 54, page 564, and Sec. 71, page 566, of statutes*. See language of Court in above case of *Babcock vs. Hollinshead*, 3 *Minn.*, 144.

The entry of judgment by the clerk in all cases is in law the act of the Court, as has been repeatedly held.

By the Court—WILSON, C. J.—It is admitted that the defendant is a foreign corporation.

The Sheriff of Ramsey County who served the summons, returns that he made the service on the 3d day of May, 1865, "by delivering to William F. Davidson, the president and general agent of the within named defendant, a true and correct copy thereof," in Ramsey County.

The first question raised is whether this service was authorized by law and gave the Court jurisdiction of the defendant.

At common law, process can only be served on a defendant, whether a natural person or a body corporate, within the State in which the action is commenced. *Middlebrook vs. Springfield Fire Ins. Co.*, 14 *Conn.*, 301; *Keilburn vs. Woodworth*, 5 *John.*, 37; *Hall vs. Williams*, 6 *Pick.*, 240; *Borden vs. Fitch*, 15 *John.*, 140; *Buchanan vs. Rucker*, 9 *East*, 192.

It is also a well settled rule of the common law that the service of process on the president or principal officer of a corporation, must be within the jurisdiction of the sovereignty where the artificial body exists. 1 *Tidd's Prac.*, (3 *Am. Ed.*) 121, note; *McQueen vs. Middletown Manu. Co.*, 16 *John.*, 6; *Nash vs. Rector*, 1 *Miles*, 78; *Davison vs. Campbell*, 2 *Miles*, 171; *Middlebrook vs. Spring. F. Ins. Co.*, 14 *Conn.*, 301; *Clark vs. N. J. Steam Nav. Co.*, 1 *Story*, 530; *Peckham vs. North Par. of, &c.*, 16 *Pick.*, 286.

And inasmuch as a corporation can have no legal existence out of the boundaries of the sovereignty that created it, (*Bank of Augusta vs. Earle*, 13 *Peters' R.*, 588; *Broome vs. Packet Co.*, 9 *Minn.*.) it follows that if a foreign corporation can be brought
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into Court, it must be by virtue of some *statutory* provision. See *Middlebrook vs. Spring. F. Ins. Co.*

To our statute, therefore, we must refer to ascertain whether the mode of service attempted in this case is valid.

Our statute law regulating the service of process is found in *Chap. 60, of the Comp. Stat., Secs. 48 to 59 inclusive.*

The only sections of this chapter that have any bearing on the question under consideration, are those numbered 52, 53, 54. They read as follows:

“Section 52. The summons may be served by the Sheriff of the county where the defendant is found, or by any other person not a party to the action; the service must be made and the summons returned to the person whose name is subscribed thereto with all reasonable diligence.”

“Sec. 53. The summons must be served by delivering a copy thereof as follows:

“1. If the suit be against a corporation, to the president, or other head of the corporation, secretary, or managing agent thereof.

“2. If against a minor under the age of fourteen years, to such minor personally, and also to his father, mother, or guardian, or if there be none within this territory, then to any person having the case or control of such minor, or with whom he resides, or by whom he is employed.

“3. If against a person for whom a guardian has been appointed for any cause, to such guardian, and to the defendant personally.

“4. In all other cases to the defendant personally, or by leaving a copy of the summons at his usual last place of abode.”

“Sec. 54. When the defendant after due diligence cannot be found within the territory, and when that fact appears by affidavit to the satisfaction of the Court or Judge, and it in like manner appears that a cause of action exists against the defendant, or that he is a proper party to the action relating to real property in this territory, such Court or Judge may grant an order that the service be made by a publication of a summons in either of the following cases:

"1. Where the defendant is a foreign corporation," &c. Sections 52 and 53 are properly read and construed together as they refer to the same class of cases.

They in some respects modify and in other respects declare the common law rule on this subject, and they ought, therefore, not to be carried farther by construction than the plain and manifest intention of the Legislature indicates, for it is a well settled rule of statutory construction, that statutes are not presumed to make any alteration in the common law farther or otherwise than the act expressly declares. 11 *Mod.*, 150; 1 *Saund.*, 240; *Bac. Ab. Tit. Stat. I.*, 4, and cases there cited; *McQueen vs. Middletown Manu. Co.*, 16 *John.*, 6; 1 *Kent's Com.*, 464.

We see nothing in the statute above cited, either expressly or by necessary implication, authorizing service on a foreign corporation by delivering a copy of the summons to an agent found within this State. *Subdiv. 1, of Sec. 53*, is merely declaratory of the common law rule as to the mode of service on domestic corporations, and there is nothing either in its language or in the context to show an intention to extend its application to foreign corporations.

Section 52 provides that service may be made *by the Sheriff of the county where the defendant is found*. As this statute applies only to Sheriffs of our State, and as foreign corporations can have no existence in this State, the inference clearly is that by section 52 and 53, service on foreign corporations is not authorized. By the latter clause of said section it was not intended to deny the power of Sheriffs to serve process on every class of persons found within the State, and subject to the jurisdiction of the Court—the object of the provision was merely to authorize others as well as the Sheriffs to make such service.

From the fact that section 54 provides for service on foreign corporations in all cases by publication of the summons, (*see Broome vs. Packet Co.*), it may reasonably be argued that service otherwise cannot be made, for—unless this is an exceptional case—section 54 only provides for service by publication in cases not falling within the provisions of sections 52 and 53.

Construing our statutes on this subject according to the well settled rules of statutory construction, we think they authorize service of process on foreign corporations only by publication.

This view is not inconsistent with the doctrine of *Broome vs. Packet Co.* We in that case held that the language of our statute—that “actions may be commenced against corporations in the same manner as other civil actions”—applies as well to foreign as domestic corporations.

We still concur in the view then expressed. In all civil actions against non-resident defendants not found within the State, the summons can only be served by publication, and when the defendant is found within the State such service is not authorized.

This being so the Court acquired no jurisdiction of the defendant in this case, and the judgment, therefore, is a nullity.

In such case the defendant may maintain a writ of error to reverse the judgment. *Skipworth vs. Hill*, 2 Mass., 35; *Gay vs. Richardson*, 18 Pick., 417; 2 *Tidd's Prac.*, (3d Am. Ed.,) 1134, and notes; *Karns vs. Kunkle*, 2 Minn., 313.

Judgment below reversed.

ARCHIBALD S. COWLEY VS. WILLIAM F. DAVIDSON.

When a complaint sets up a contract and alleges a breach thereof, a demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action, is not well taken, since the plaintiff is at least entitled to nominal damages.

This action was commenced in the Ramsey County District Court. The complaint sets out an agreement entered into on the 15th day of April, 1864, between the plaintiff and defendant, by which defendant agreed to transport from Ottawa, Minnesota, and to deliver to plaintiff's assignees at Milwaukee, Wisconsin, 5,000

bushels of wheat, on or before May 20th, 1864, in consideration that plaintiff should furnish such wheat at Ottawa, and upon its delivery at Milwaukee pay defendant 33 cents per bushel for such transportation and delivery; and in case of the failure so to deliver said wheat or any part thereof, the defendant agreed to deliver to said consignee at Milwaukee for plaintiff, 5,000 bushels of No. 1 wheat, or a sufficient quantity to make up the amount delivered to 5,000 bushels. It further alleges the willingness and readiness of plaintiff to perform the agreement on his part, and the total failure of defendant to perform the same on his part, and that the market value of the wheat on said 20th day of May, 1864, at Milwaukee, was \$1.28, and at Ottawa 60 cents per bushel; and that by reason thereof and of the premises, plaintiff has been damaged \$1,750 and interest from said 20th of May, 1864, and demands judgment for such sum and interest. The defendant demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action.

The demurrer was overruled by the court below, and from the order overruling the same, the defendant appeals to this Court.

LORENZO ALLIS for Appellant.

The complaint is insufficient, because—

First—It states no fact showing that the plaintiff has been damaged. For aught that appears to the contrary, the plaintiff may have disposed of the wheat since May 20th, 1864, at Milwaukee, Ottawa, St. Paul, or other point, for more than he could have obtained for it at Milwaukee on the 20th of May, 1864, or he may still have the wheat on hand, and it may have greatly enhanced in value, so that the plaintiff may have been actually enriched instead of injured by the alleged breach of contract by defendant. At all events no fact is stated showing that he has suffered any damage thereby.

The principle is now well settled that the object in awarding damages in such cases is simply *compensation*.

It does not appear that plaintiff has ever sold or disposed of his

wheat. Hence in this action, besides holding his wheat, he is seeking to recover the difference between the value of the wheat at Ottawa and Milwaukee on the 20th of May, 1864, less the said agreed price of transportation.

This is wholly inadmissible. It is perfectly clear that the plaintiff could not keep the wheat to speculate therewith on the market, and at the same time claim precisely the same damages as though he had been compelled to sell the wheat at Ottawa, on the said 20th day of May, at said market price of 60 cents per bushel.

The plaintiff states no fact showing that he has been in any wise injured in the premises.

Second—The rule of damages, according to which the plaintiff claims specifically to recover, is wholly erroneous and inadmissible.

It was the plain duty of the plaintiff, on the failure of the defendant to transport and deliver the wheat according to contract, to cause the same to be forwarded to its destination at the earliest day and the lowest rate practicable.

The defendant would then have been liable to the plaintiff for the additional expense of transportation over the contract price, for the charges of storage and insurance after the 20th of May, and perhaps for all losses caused by the decline of the market at Milwaukee, between the 20th of May and the time when the wheat actually reached market.

This is, undoubtedly, the correct rule of damages in the premises, and it is clearly incumbent on the plaintiff to state sufficient facts to show its application, and to enable it to be applied, which he has wholly failed to do.

It is possible that in the absence of any means of forwarding the wheat to its destination, after the defendant's failure to perform his contract, a state of facts might have existed which would have justified the plaintiff in selling the wheat at Ottawa, and then claiming of defendant the difference between the proceeds of such sale and the market price at Milwaukee, less the contract price of transportation.

But no such state of facts is shown to have existed, nor did any

such sale of the wheat, in fact, take place, so far as appears.

Third—The complaint does not show that defendant's failure to deliver the wheat was not caused by the "dangers of river navigation and fire," specially excepted against the contract.

The demurrer is clearly well taken.

W. K. GASTON for Respondent.

The Court below properly overruled the demurrer of appellant—

First—Because the complaint states facts sufficient to constitute a cause of action. *Angell on Common Carriers*, Secs. 483, 484, 485, &c.; *Sedg. on Measure of Damages*, page 72, 366, 357, &c.

Second—Because said demurrer is frivolous and vexatious, and interposed merely for the purpose of delay.

By the Court—BERRY, J.—The complaint in this action sets out a contract between the parties, and avers a breach thereof. The demurrer admitting the truth of the complaint, the respondent is entitled to nominal damages at any rate. *Sedg. on Dam.*, (47); 3 *Par. Con.*, 217, 218; 2 *Gr. Ev.*, Sec. 254. The complaint therefore contained facts sufficient to constitute a cause of action, and so the demurrer was properly overruled. If the allegation of the complaint in which the respondent seeks to lay down the rule by which his special damages are to be estimated, are insufficient or irrelevant, the defect cannot be reached by demurrer so long as other parts of the complaint contain a sufficient statement of a cause of action.

Whether the demurrer was well taken is the only question before us, and we therefore forbear to express any opinion upon the correct standard of damages, a matter to which the demurrer does not extend.

The order overruling the demurrer is affirmed and the action remanded.

D. W. INGERSOLL & CO. VS THE FIRST NATIONAL BANK,
GARNISHEE, &C.

S. S. Eaton, defendant, deposited in the First National Bank money in name of "S. S. Eaton, Agent." *Held*—That this was not conclusive evidence that the money was the property of said Eaton, and the officers of the Bank having denied any indebtedness to him, or the possession or control of any money or effects belonging to him, the plaintiffs could not proceed farther against the garnishee without filing a supplemental complaint as provided in *chapter 70 of the Laws of 1860*.

Proceedings were instituted by D. W. Ingersoll & Co., plaintiffs, against the First National Bank, Garnishee of S. S. Eaton, defendant. Testimony was taken before a referee on the 5th of January, 1865, pursuant to an order of the District Court of Ramsey county.

J. E. Thompson, the president of said bank, testified in substance, that he knew S. S. Eaton; that Eaton had no account in the books of the bank, nor has he made any deposits there; there appears on our deposit ledger the name of "Samuel S. Eaton, Agent;" according to the books the balance this morning to the credit of "Samuel S. Eaton, Agent," is \$273.55.; the bank has never had any deposit account in its books with S. S. Eaton, except as agent. * * *

H. P. Upham, the teller of the bank, testified that the account was in the name of "Samuel S. Eaton, Agent," in the books of the bank. * * *

Samuel S. Eaton testified, that he had not on the first day of July last, or at any time since, and has not now, any money, property, or effects, in the hands of the First National Bank; that the bank was not indebted to him in any sum; the account referred

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to in the testimony of J. E. Thompson was kept by him as agent; that he was then and is now the agent of seven different insurance companies, and the agent of persons residing East for property here; that all moneys deposited by him as agent was money belonging to the companies and persons represented by him as such agent. * * *

A motion for judgment against the garnishee was made upon the disclosure before the referee, and denied by the District Court, and the plaintiffs appeal from the order denying such motion.

BRISBIN & WARNER for Appellants.

VAN ETEN & OFFICER for Respondent.

By the Court—WILSON, C. J.—Proceedings against a garnishee are for the purpose of reaching *the property of the defendant*.

The deposit of money in the bank in the name of "Samuel S. Eaton, Agent," is not conclusive evidence that the money was the property of said Eaton, or that the bank thereby became his debtor. If the money is not the property of the defendant, the plaintiff is not legally or equitably entitled to it. The garnishee having denied any indebtedness to the defendant, or the possession or control of any property, money, or effects belonging to him, the plaintiff can only proceed further by filing a supplemental complaint as provided in *Chap. 70, of Laws of 1860*.

The order appealed from is affirmed.

BAILEY HOWES VS. HARVEY GILLETT.

The plaintiff in the action is not entitled to a second trial under *sec. 5, chap. 64, p. 595, Pub. Stat.*

An order granting a plaintiff a second trial in such case is appealable.
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The plaintiff (Howes) brought an action of ejectment against the defendant, (Gillett,) and judgment was rendered in the District Court of Dakota County, against the plaintiff for costs and disbursements. Plaintiff paid the judgment, and served a written demand for another trial, and made a motion to said Court for an order to place said cause on the calendar for another trial thereof, which motion was granted and such order entered.

The defendant appeals from said order.

CLAGETT & CROSBY, T. R. HUDDLESTON and SMITH & GILMAN
for Appellant.

The Court erred in granting another trial to the plaintiff.

Sec. 5, Chap. 64, page 595, of the Comp. Stat., provides that "Any person against whom a judgment for the recovery of specific real property is rendered, may within six months after written notice of the judgment, upon the payment of all costs and damages recovered thereby, demand another trial," &c.

This statute is in derogation of the common law and common right, and must be strictly construed.

A second trial in an action of ejectment was not given by the common law, and it is not given in any case by the law of Minnesota, except the one provided for by this section.

A second trial is given only to the person against whom a judgment for the recovery of specific real property is rendered.

A judgment for the recovery of specific real property can only be rendered against the defendant in an action of ejectment.

As a condition precedent to another trial, the party is required to pay all costs and damages recovered by the judgment. *Sec. 5, page 595, C. S.*

In an action for the recovery of real property, damages cannot be recovered against the plaintiff—but can be recovered against the defendant for withholding the property from the plaintiff. *C. S., page 543, Sec. 87.*

Section 7 provides that the judgment last given shall be the final determination of the rights of the parties, and if a prior

judgment shall have been executed, restitution must be ordered.

The word damages used in the 5th section, and the proviso in the 7th section, show clearly that the defendant only is entitled to another trial; for

The defendant only can have a judgment for the recovery of specific real property rendered against him. He is the only party against whom a judgment for damages can be rendered—and the only party to whom restitution can be ordered in case a prior judgment shall have been executed.

The law favors the party in possession. *Graham & Waterman on New Trials*, Vol. 3, page 1351, citing 5 Ohio, 245.

The plaintiff must recover upon the strength of his own title, and not upon the weakness of that of his adversary.

When he comes into Court he must come prepared to prove his title—if he fails the judgment against him is final. But the law of Minnesota favoring the party in possession, will not permit him to be ousted of his possession without a second trial, if he demands it.

S. SMITH for Respondent.

The Court below had nothing to do with the granting of a new trial in this action—the plaintiff was entitled to a new trial as a matter of right, having demanded the same and paid the costs in the manner and within the time prescribed by statute. *See Comp. Stat., Sec. 5, of Chap. 64, on page 595.*

The motion on which the order appealed from was granted in effect was to place the cause on the calendar for trial. The order of the Court was that it be placed on the calendar, and is not an appealable order. *See Session Laws of 1861, page 133.*

The counsel for the appellant claim that by our statute a new trial is only given to the defendant, as a judgment for the recovery of specific real property, can only be rendered against the defendant—that the statute is in derogation of the common law and must be strictly construed.

If the counsel are correct in their views, the statute has not

interfered with the common law rights of the plaintiff in relation to new trials in actions of ejectment, but has only abridged the rights of the defendant.

By the common law either party in an action of ejectment had a right to contest the right of possession as often as he saw fit, until enjoined by a court of chancery. See 2 *Schwyn's Nisi Prius*, pages 670 and 671; *Baze vs. Arper*, 6 *Minn. R.*, 233 and 234; 23 *Wend.*, 482.

A fair construction of the statute will give to each party an equal right to a new trial.

By the Court—BERRY, J.—We perceive no reason why the order made in this action in the District Court is not appealable, for it appears to have been both in form and effect an order granting a new trial.

Whether the respondent was or was not entitled to a new trial depends wholly upon the statute. *Sec. 5, Chap. 64, page 595, Pub. Stat.*, enacts "that any person against whom a judgment for the recovery of specific real property is rendered, may within six months after written notice of the judgment, upon the payment of all costs and damages recovered thereby, demand another trial by notice in writing to the adverse party or to his attorney in the action, and thereupon the action may be brought to trial by either party." Now, the only party to an action of ejectment as in this case against whom a judgment for the recovery of real property can be rendered must be the defendant. He is in possession, and in no reasonable sense can it be contended that a judgment denying the plaintiff's right to a recovery is a judgment against him for a recovery. It is impossible to recover from him what he has not got. Again, the second trial is to be granted upon the payment of costs and damages. Damages in ejectment are awarded for the withholding of the property in dispute or for rents and profits, and it cannot be claimed that such damages could be recovered against a plaintiff not in possession. *Sec. 4, Id.* By section 7 where the result is changed by a new trial, *restitution* is to be ordered in case the prior judgment has been executed.

And this serves to confirm the idea that the party from whom the property has been taken away, and who has been deprived of his possession by the judgment in the first trial, is the party entitled to review by a second trial.

Whether each party ought or ought not in reason to be entitled to a new trial in actions of ejectment, the theory of our law on the subject seems to be that when the question of title has been once fairly litigated according to the course of practice in the courts, the defendant, the party in possession, shall not be harassed by a second trial. When the plaintiff institutes his action he ought to know whether he has any title and what it is, and our statute does not see fit to allow him to make repeated experiments at the expense and to the inconvenience of the defendant, unless he can bring himself within the rules applicable to other civil actions.

The order granting another trial is reversed.

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HARRIET R. HOLMES AND HUSBAND VS. BENJAMIN F. CAMPBELL.

Plaintiffs and defendant were owners as tenants in common of a judgment. By the terms of the assignment either of the assignees were expressly authorized to collect the judgment to their joint use. The defendant, one of the assignees, proceeded to collect the judgment and at the sale under the execution bid off the property in his own name, and in due time the title in him became perfect.

Held—1. That to the extent of the purchase the defendant acted within the scope of the power conferred by the assignment. 2. That in the absence of any circumstances showing fraud or bad faith, or that the action of the defendant was not for the benefit of the assignees, or that the purchase was not intended to be in pursuance of the power, the defendant holds the lands in trust for the plaintiff to the extent of her interest in the judgment; and 3. That the defendant is not liable as for money had and received.

The complaint in this action alleges the assignment of a judg-

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ment against one Henry H. Williams, to the plaintiff, Harriet R. Holmes, and the defendant, *to be by said assignees held and owned jointly, with authority to them or either of them to collect the same to their own use*; that defendant caused execution to issue on said judgment, under which certain real estate of the judgment debtor was levied upon and sold; that defendant bid off such real estate at the sale, and the sheriff holding the execution returned the same satisfied to the amount of the purchase money; that the time of redemption from said sale had expired and the proper sheriff had duly executed a deed of the premises so sold, to the defendant; that no part of the purchase money of said premises was ever paid by defendant, either to his co-assignee or to said sheriff. It further alleges a demand for the payment of one-half of the said purchase money of defendant and his refusal to pay the same, and demands judgment for one-half of said purchase money and interest.

The defendant demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, or to entitle the plaintiff to the judgment therein demanded. The demurrer was sustained by the Court below. The plaintiff appeals from the order sustaining the same to this Court.

—HENRY HINDS for Appellants.

First.—The defendant holds the land purchased by him, not by reason of his having had an interest in the judgment under which the sale to him was made, but under and by force of his contract of purchase made with the sheriff upon the sale. The sale by the sheriff to the defendant Campbell, extinguished the interest of both the assignees in the judgment *pro tanto*, and although there was a joint interest in the judgment, there was no joint interest in the land purchased under the judgment. Campbell purchased the land of the sheriff by a parol contract, made at the auction, which was consummated by the delivery and acceptance of the subsequent certificate of sale and sheriff's deed. He applied his own interest in the judgment, and also the interest of his co-owner in

payment for the land purchased by him, and took the conveyance to himself, thus bringing the case within *Sec. 7 of Chap. 32 of the Comp. Stat.*, relating to uses and trusts. There is, then, no remedy for the plaintiff upon the land, because no fraud or misconduct is charged upon Campbell in conducting the matter thus far, and therefore he has the whole legal and equitable title in the land so purchased by him; or if such is not the absolute legal result of Campbell's position, yet the plaintiffs have the right to elect which remedy they will pursue, the equitable remedy, to reach a share of the land, or their legal remedy upon the contract of sale, as made by Campbell with the sheriff at the sale, such contract enuring to their benefit. *Secs. 7, 8 and 9 of Chap. 32, above cited; Sumner vs. Sawtelle et al.*, 8 Minn. R., 318; *Hatmaker vs. Garfield*, 15 N. Y. R., 475.

Second—If the defendant took the absolute, legal and equitable title to the land by virtue of his contract of purchase at the sheriff's sale, then he should pay over to the sheriff, or to his co-owner of the judgment, the contract price therefor, as made with the sheriff, less the amount of his own interest in the judgment, and, in default thereof, the co-owner or his assigns may, either with or without demand, sue the defendant upon the contract made with the sheriff, as having been so made by the sheriff for the benefit of the co-owner of the judgment, or his assigns.

Third—We are then brought to the inquiry next as to what was the quantity of interest of the assignees in the judgment. To determine this question, it will only be necessary for the Court to refer to the allegation of the complaint, "that the judgment was assigned to be by them owned and held jointly, and then to put a construction upon the word "jointly," it is most respectfully submitted that the word "jointly," imports an equal interest in the thing so held and owned; but at all events such an assignment imports that the assignees have each some interest in the thing assigned, and if so, a demurrer will not lie for an indefinite allegation. *Burrill's Law Dic.*, "Joint Tenants;" 4 *Kent's Com.*, 7th Ed., p. 315.

Fourth—If the complaint states no cause of action as it stands,

leave should have been allowed the plaintiffs to amend, or if an action at law cannot be maintained by the plaintiffs upon the facts stated, leave should have been granted to file a complaint in equity. In the absence of such leave, and in the absence of any reason assigned by the court below for its action, it is to be inferred that the court intended to deny the plaintiff any relief. Should this court come to the conclusion that the present complaint is defective either in matter, or in the form of the action, the plaintiffs now ask leave to amend accordingly.

A. G. CHATFIELD for Respondent.

• The action will not lie.

I.—Because one joint tenant or tenants in common cannot maintain an action for money had and received against his cotenant, who had received more than his share of the property or profits. *Chit. on Cont.*, 533, (*marginal* 623, *Perkins'* 9 *Am. Ed.*); 5 *Exchq. Rep.*, 28; *Comyn on Cont.*, 742; 10 *Sergt. & Rawle*, 219; *Sherman vs. Ballou*, 8 *Cow. Rep.*, 304; 1 *Story's Eq. Jur.*, Sec. 466; *Sheldon vs. Wells*, 4 *Pick. Rep.*, 60.

In this case the plaintiffs do not allege that they ever demanded of the defendant that he should convey to them their share of the land obtained by him on the judgment. They only demanded money.

Each one has an undivided interest in the property, and such interest pervades every part of it; and precisely so of the avails or profits of it, whether it be converted into money or other property, each having an undivided and pervading interest in the whole, has an equal right with the other to the possession, custody and control of it, and neither can maintain an action at law against the other for it; nor can either alone maintain an action against a third person on account of it. If either receives the avails of it in other property in his own name, a trust results to the use of his cotenant to the extent of his interest. See 2 *Johns. Rep.*, 468; 12 *Johns. Rep.* 484, and 15 *Johns. Rep.*, 179. The only remedy which either has against the other is in equity, an action of ac-

count at law being obsolete. *See Hill vs. Gibbs*, 5 *Hill Rep.*, 56, and note "A," and authorities there cited; *McMurry vs. Rawson*, 3 *Hill Rep.*, 59.

II.—Because the plaintiffs do not show by their complaint that the defendant has received any money whatever belonging to plaintiffs. He received property—land in satisfaction of moneys due to plaintiffs and defendant jointly. He received it to their joint use, precisely as they held the judgment. He could not receive it otherwise. He received it just as he would have received the money if the property had been purchased by a third person, for the joint use of the owners of the judgment; and it has already been shown that the plaintiffs' remedy against the defendant would have been in equity, and not by an action at law for money had and received, for each and every dollar would have been the joint property of the plaintiffs and defendant.

It is not shown by the complaint, nor is it true, that defendant has converted the land into money, and the receipt of property by one to the use of another, will not maintain an action for money had and received. It is only when such property is converted into money, or its equivalent, that such an action can be sustained. This is the general rule.

III.—To enable one party to maintain an action against another for money had and received, the circumstances must be such as to establish a privity of contract between them as separate parties; such a privity as to at least imply a promise by the one to the other to pay the money. The promise either express or implied is the foundation of the action.

That privity of contract does not exist between joint owners or tenants in common. The relation does not create it, consequently neither can maintain an action at common law against the other for receiving more than his share. *Story's Eq. Jur.*, Sec. 446.

By the Court—McMILLAN, J.—The parties to this action were owners as tenants in common of the judgment mentioned in the complaint. By the terms of the assignment to them either of the assignees were expressly authorized to collect the judgment to
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their joint use. This authority extends to whatever may necessarily or reasonably be done to effect the collection, and within these limits whatever may be done by either is done as the trustee or agent of the other to the extent of his interest. The ordinary mode of collection is by execution upon the judgment, and in the absence of personal property by sale of real estate, at which the plaintiff in the execution may become the purchaser.

It is not only proper, but in our State it is usual and may be necessary in order to protect the plaintiff's interest, that he become the purchaser at the sheriff's sale. In this instance the defendant Campbell, one of the assignees, proceeded to collect the judgment, and at the sale under the execution issued upon the judgment, bid off the property described in the complaint, in his own name, and in due time the title in him became perfect. This to the extent of the purchase, we think, was within the scope of the power conferred by the assignment. No other facts except the purchase in this manner are stated which show any fraud or a bad faith in the purchase, or that the action of the defendant was not for the benefit of the assignees of the judgment, and necessary for their protection, nor that the purchase was not intended to be in pursuance of this power. Although perhaps the purchase should have been in the joint names of the assignees of the judgment, the mere fact of the purchase in the name of the defendant, under these circumstances will not be considered fraudulent, "for in such case a court of equity will presume that the party meant to act in pursuance of his trust and not in violation of it." 2 *Story Eq. Jur.*, Sec. 1210, and authorities cited. The defendant, therefore, holds the land in trust for the plaintiff to the extent of that portion of her interest in the judgment which has been satisfied by the sale. This is not the case of a grant to one for a valuable consideration which has been paid by another, within Sec. 7, Chap. 32, of the *Comp. Stat.*, p. 382, and is not affected by that section.

We think the facts stated in the complaint do not show that the land was taken by the defendant in his own right as money, but that it was purchased by the defendant on the joint account, and for the joint benefit of the assignees of the judgment. The defen-

dant, therefore, is not liable as for money had and received. The demurrer was properly sustained, but as the plaintiff desires to amend his complaint, he may have that privilege. Let the order appealed from be so far modified as to permit the plaintiff to serve an amended complaint within twenty days after notice of this decision.

STATE OF MINNESOTA VS. CORNELIUS DINEEN.

An indictment under *chap. 41, Sess. Laws 1864*, which properly charges the assault with intent to do great bodily harm, and states further a striking, beating, and wounding of the party assailed, does not charge two offences.

A stone may or may not be a dangerous weapon, depending upon its size and other circumstances.

An indictment under the statute alleged that the defendant "being armed with a dangerous weapon, to wit: a large heavy stone, did make an assault," &c. *Held*—That the allegation was sufficient.

The arming must take place prior to the assault, but may be at the place of the assault or elsewhere.

If the arming take place prior to the assault charged, it matters not that the defendant was engaged in a general affray or riot, at the time of the assault.

When two felonies are proved one does not merge in the other.

In reference to the intent of the defendant in arming, the Court charged that "if the acts and conduct of the defendant were wrongful and purposely done, the felonious intent may be inferred; a person is presumed to intend what he does, and the jury are left to judge of the intent of the party as the same may be disclosed by all the surrounding circumstances;" and in a subsequent portion of the charge, with reference to the intent charged in the indictment, gave the law upon this subject to the jury fully and with a careful regard to the rights of the defendant. *Held*—There was no error.

The defendant requested the Court to charge "that if the jury find from the evidence that at the time and place and in the presence and midst of the disturb-

ance spoken of by the witnesses, the defendant on a sudden and in the heat of a momentary excitement picked from the ground a stone or rock with which he was not previously armed, and struck the blow sworn to, then he is not guilty of the offence charged in the indictment." The Court refused so to charge, and charged that the request was too broad, but that such circumstances might be considered by the jury in determining the question of intent, and gave to the jury the law on the subject of intent. *Held*—There was no error.

The defendant requested the Court to charge "that if the jury find that any persons to the number of twelve or more, any of whom were armed with dangerous weapons, were riotously or tumultuously assembled at the time of the occurrence, and that this was one of the acts then and there committed, then the crime was riot, and that the defendant cannot even be convicted of an assault, but must be acquitted." The Court refused so to charge. *Held*—There was no error.

The Court charged the jury that the defendant was presumed innocent until he was proved guilty, that the burthen of proof rested upon the prosecution to establish by competent proof all the material facts alleged in the indictment, of which the criminal intent was one. That it was not merely sufficient that this be done by a preponderance of proof as in civil cases, but the case must be clearly made out to the satisfaction of the jury; that in order to convict, the jury must be satisfied beyond a reasonable doubt; that this does not require unreasonable or impracticable things at the hands of the prosecution, nor absolute certainty; but the jury should be satisfied as reasonable men so that they would be willing to act upon it in matters of great importance to themselves. The defendant excepted to the last clause of the charge. *Held*—That the last clause qualified all that preceded it, and did not go to the extent of the settled rule "matters of great importance," &c., should have been "matters of the greatest importance," &c.

The defendant was indicted in the Hennepin County District Court, for an assault with intent to do great bodily harm, being armed with a dangerous weapon. After the trial, at the request of the defendant, the Judge of the Court below reported the case to the Supreme Court, for its decision of certain questions of law arising upon the trial. A sufficient statement of the case appears in the opinion of the Court.

WILLIAM LOCHREN for Appellant.

G. E. COLE, ATTORNEY GENERAL, for Respondent.

I.—The indictment is not bad for duplicity. The section cited is not the law. The existing law on the subject of demurrers for duplicity will be found—*sec. 133, p. 28, Amend. to R. S.; Com. vs. Tuck., 20 Pick., 360; Com. vs. Eaton, 15 Pick., 273; The State vs. Ayer, 3 Fbs., 317.*

II.—Whether or not a weapon is dangerous depends upon the manner of using it, and the subject upon which it is used. *Wharton's Cr. Law, 3914; Roscoe's Cr. Ev., 769; Russell on Cr., 120,* and whether, under all the circumstances, the weapon used was a dangerous one, was a question for the jury. *Com. vs. Drew, 4 Mass., 391, 396.*

The construction placed by the counsel upon the term “dangerous weapon,” as used in *Chap. 41, Laws of 1864,* and the object of the passage of that Act, is erroneous. *Sec. 18, p. 742* provides for the case to which he alludes. The words as there used probably have the restricted operation for which he contends.

III.—Persons indicted for an assault and battery cannot be acquitted because the proof shows that they were guilty of a riot. *Wharton's Cr. Law, 1261.*

IV.—The English Game Statutes have no analogy to the statute in question here. The offence under those statutes consisted in the unlawful entry of lands, being armed, &c., and it was very properly held that the parties entering must have been armed at the time of entry, here being armed at the time of the assault is sufficient. 1 *Roscoe's Cr. Ev., 536.*

V.—The charge that if the acts were wrongful and purposely done, a felonious intent might be inferred, was correct. It only gave to the jury the established doctrine that a party is presumed to intend the natural consequences of his acts, that a felonious intent need not be specifically proved, but is to be inferred from the nature of the acts shown to have been committed. *Wharton's Cr. Law, 712.*

VI.—The explanation of the term “reasonable doubt,” that it “would be sufficient if the jury were satisfied as reasonable men,

so that they would be willing to act upon the evidence in matters of great importance to themselves," was correct. They could not be satisfied as reasonable men, unless the charge was proved beyond a reasonable doubt. The rule laid down by Mr. Greenleaf in the first volume of his work on evidence, is not as the counsel contends, confined to civil actions, but on the contrary, has no application to civil actions, and is exclusively applicable to criminal prosecutions. In civil actions the jury need not be satisfied, but may decide upon a mere preponderance of evidence. 1 *Greenl. on Ev.*, Sec. 2.

This rule was adopted by the Court and given to the jury, and taken in connection with the entire charge on this point, was strictly correct.

By the Court—McMILLAN, J.—The indictment in this case is framed under the first section of *Chap. 41, Session Laws, 1864*, which is in the following language: "If any person, being armed with a dangerous weapon, shall assault another with intent to do great bodily harm, he shall be punished by fine," &c.

The indictment charges that the defendant on the 8th of November, 1864, at Minneapolis, in Hennepin County, being armed with a dangerous weapon, to-wit: a large heavy stone, did make an assault upon one George A. Brackett with intent to do him great bodily harm, and then and there with the said stone, which he the said Cornelius Dineen then and there had and held in his hand, &c., did strike, beat and wound the said Brackett upon his head, &c. The defendant demurred to the indictment and raises two objections in support of the demurrer:

1. Duplicity in charging two offences.
2. That the facts stated constitute a simple assault and battery which is not indictable.

The indictment certainly charges the assault with intent to do great bodily harm, which is the statutory offense; the fact that it states the beating and wounding cannot vitiate the indictment, it is mere surplusage. *Commonwealth vs. Tucker*, 20 *Pick.*, 360; *State vs. Ayer*, 3 *Foster*, 317; *Commonwealth vs. Eaton*, 15

Pick., 273; *Stooks et al. vs. The Commonwealth*, 7 S. & R., 499.

The ground of the second objection is that a stone is not a dangerous weapon within the meaning of the statute.

A dangerous weapon is one likely to produce death or great bodily harm. A stone may or may not be a dangerous weapon, depending upon its size and other circumstances. A large heavy stone in the hands of a man intending to do great bodily harm is likely to produce that result. We think the allegation is sufficient. 1 *Rus. on Cr.*, 473, (5th Am. Ed.)

The cause having been tried, at the close of the testimony the defendant's counsel submitted several propositions, which he requested the Court to give in charge to the jury.

First—That a stone or rock in the hands of a person is not of itself what the law denominates a dangerous weapon, but its character depends upon the circumstances attending its use. The Court so charged, but charged further in this connection: "That a person having and using a stone or rock, may or may not be said to be armed with a dangerous weapon under the statute, according to the size and description thereof, and the manner in which it is seized, held and used and the peculiar circumstances of each case."

Offensive and dangerous weapons would seem to be synonymous terms. 1 *Rus. on Cr.*, 118; 1 *Bishop's Cr. Law*, Sec. 200.

The intention of the Court in this portion of the charge, we infer, was to instruct the jury as to what constitutes a dangerous weapon, not what constitutes an arming with such weapon. In this wise we are unable to see that the instruction excepted to is anything more than an elaboration of the request submitted by the defendant's counsel. All the characteristics mentioned by the Court, are embraced in "the circumstances attending its use" as stated in the request, and are proper to be considered in determining the character of the weapon. 1 *Rus. on Cr.*, 473, (5th Am. Ed.); *Roscoe's Cr. Ed.*, 558-9.

The second request submitted was as follows: "That in order to convict the defendant of the offence charged in the indictment the jury must find that the defendant brought the stone from some other place to the place of the affray." The Court refused so to

charge and the defendant excepted. In this connection the Court charged the jury as follows: "In reference to the weapon, if the circumstances are such as to satisfy you that the defendant seized and used a stone of sufficient size and character with the intent to use it for the purpose of offence, I charge you it is sufficient on this point."

The third request was as follows: "That if the jury find that the defendant picked up the stone at the place of the affray and while it was going on and suddenly struck the defendant therewith, that he is not guilty of the offence charged." The Court refused so to charge and the defendant excepted. In connection with this request the Court charged, "That if the jury find that the defendant was armed with a stone before the assault upon Brackett, or any melee between himself and Brackett, it is immaterial that he took the weapon, as a gun or pistol from a friend, or a stone from the ground, provided such taking of the weapon was prior to the acts constituting the alleged assault and injuries, and provided, the circumstances showed the criminal intent."

The substance of the charge upon these two requests is that to constitute an arming within this statute, the defendant must have taken the weapon with the intention of using it for offensive purposes, and that to constitute the offence charged this arming must have taken place prior to the assault, but may have been at the place of the assault or elsewhere.

Whether it is necessary that the weapon should have been taken with the intention of using it for offensive purposes, may perhaps admit of doubt, and as the charge in this respect is favorable to the defendant and this question is not raised here, we need not stop to consider it. But the remaining portion of the charge, we think, is clearly correct. The place of arming is not material. The English statutes and decisions thereunder, cited by the counsel for the defendant, are not analogous on this point. As to the time of being armed it is only necessary under this statute that it precede the assault.

The fifth proposition is as follows: "That to convict the defendant of the crime charged in the indictment, the jury must

find that the defendant before engaging in the affray had armed himself with the stone used, with the intent to commit an assault therewith on Brackett or some person."

The Court charged the jury that if the word "affray" in the request be understood as confined to the encounter between the defendant and Brackett, then the request would be correct. But if the word "affray" was used in a more general sense, and applied to a general disturbance going on at the time, then the request was not law and was refused. The Court here distinctly informs the jury that the arming of the defendant must have been prior to any encounter between himself and Brackett.

The fact that the defendant may have been engaged in the commission of an affray cannot in itself be a justification or excuse for any offence he may have committed. The same acts may constitute or be parts of different offences. The offence of riot is entirely distinct from the offence created by this statute, yet it is evident that a party engaged in the commission of a riot may as a part of the riotous proceedings, assault another with intent to do him great bodily harm. And the fact that the evidence shows the defendant was guilty of both offences is not a defence to either. Both offences by our statutes are felonies, and there can in no event be a merger of one in the other. 2 *Rus. on Cr.*, 432. There was in this instance a personal encounter between the defendant and Brackett, then if at all the assault charged was committed by the defendant, and if the arming by the defendant took place prior to this encounter it is sufficient. The instruction of the Court with respect to the intent of the defendant in arming, is the same as before noticed, and is at least favorable to the defendant.

The Court further charged the jury in connection with this request, "But if the acts and conduct of the defendant were wrongful and purposely done, the felonious intent may be inferred; a person is presumed to intend what he does and the jury are left to judge of the intent of the party, as the same may be disclosed by all the surrounding circumstances."

It would perhaps have been somewhat more accurate to have
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used the word *criminal* instead of *felonious* in this instance. The instruction given was in response to the fifth request, and necessarily refers to the intent therein mentioned, namely, the intent in arming. This question of intent as we have remarked is doubtful, and certainly the intent mentioned need only have been a criminal and not a felonious intent as technically understood. And in any event we cannot see that any injury could have resulted to the defendant, for in a subsequent portion of the charge with reference to the intent charged in the indictment, the law upon this subject is fully laid down with a careful regard to the rights of the defendant.

The sixth request is as follows: "That if the jury find from the evidence that at the time and place and in the presence and midst of the disturbance spoken of by the witnesses, the defendant on a sudden and in the heat of a momentary excitement picked from the ground a stone or rock with which he was not previously armed and struck the blow sworn to, then he is not guilty of the offence charged in the indictment." The Court refused so to charge and the defendant excepted. The Court charged the jury in connection with this refusal, "that the request was too broad, but that such circumstances might be considered by the jury in determining the question of intent, but the Court would not take from the jury the determination of that question; that the jury were the exclusive judges of the fact. That the criminal intent might be shown by direct evidence, such as threats, acts of preparation, &c., or it might be implied from the act itself when such act was in itself criminal, intentionally done and without just cause or excuse, and it was for the jury to say whether there were circumstances of excitement, provocation or excuse such as to throw doubt on this question." To this charge the defendant excepted. We see no error in the charge. If this were an indictment for assault with intent to murder the proposition submitted might perhaps be correct, for in that case the act must be such that if it had resulted in the death of the party assailed, the crime would have been murder in the first degree under our statute; but on an indictment under this statute that is not the case.

Suppose instead of a stone, a party under the circumstances stated in the request, should seize a gun from a bystander and shoot and seriously wound another, can there be any doubt that he would be guilty of the offence charged in the indictment? Yet there is no difference in principle between the case supposed and that under consideration; the weapon is a dangerous weapon in either case. And while from the character of the weapon the presumption in fact as to intent may be stronger in some cases than others, yet it exists in all cases where the assailant is armed with a dangerous weapon. There is nothing in the circumstances stated in the request which at all precludes, or is inconsistent with the existence of an intent to do great bodily harm. But the Court correctly stated that these circumstances were proper for the consideration of the jury in determining the intent.

The seventh request is as follows: "That it is incumbent on the prosecution to prove beyond a reasonable doubt that the defendant armed himself with a stone before he became engaged in the riot or disturbance, and that if the jury have a reasonable doubt on this point, they cannot find the defendant guilty of the charge laid in the indictment." The Court refused so to charge and the defendant excepted. The Court charged in this connection, "That the Court would not limit the power of the jury to find as to the question of intent upon the evidence, subject to what the Court charged in reference to the facts necessary to constitute the offence charged, and the definition of intent given by the Court; but that the jury are directed to take the facts as they existed into consideration in coming to a conclusion in reference to the question." The defendant excepted. This is necessarily disposed of by the view we have taken of that portion of the charge, relating to this subject under the fifth request submitted.

The eighth request was as follows: "That if the jury find that any persons to the number of twelve or more, any of whom were armed with dangerous weapons, were riotously or tumultuously assembled at the time of the occurrence, and that this was one of the acts then and there committed, then the crime committed was not and the defendant cannot even be convicted of an assault, but

must be acquitted." The Court refused so to charge and the defendant excepted.

From the view we have taken of this question in a former part of this opinion, it follows that the refusal of the Court to charge this request was correct.

The Court further charged the jury that "The defendant was presumed innocent until he was proved guilty; that the burthen of proof rested upon the prosecution to establish by competent proof all the material facts alleged in the indictment, of which, the criminal intent was one. That it was not merely sufficient that this be done by a preponderance of proof as in civil cases, but the case must be clearly made out to the satisfaction of the jury. That in order to convict, the jury must be satisfied beyond a reasonable doubt. That this does not require unreasonable or impracticable things at the hands of the prosecution, nor absolute certainty; but the jury should be satisfied as reasonable men, so that they would be willing to act upon it as in matters of great importance to themselves." To this last clause of the charge the defendant excepted. The charge on this subject must be taken together.

The rule of law upon this subject is thus laid down by Greenleaf: "By satisfactory evidence which is sometimes called sufficient evidence, is intended that amount of proof which ordinarily satisfies an unprejudiced mind beyond a reasonable doubt. The circumstances which will amount to this degree of proof can never be previously defined; the only legal test of which they are susceptible, is their sufficiency to satisfy the mind and conscience of a common man; and so to convince him that he would venture to act upon this conviction in matters of the highest concern and importance to his own interest." 1 *Greenl. Ev.*, Sec. 2; 1 *Stark. Ev.*, page 577.

This we consider the well settled rule applicable to all criminal cases whatever charge may be involved. In actions of this nature the life, liberty or character of the defendant is at stake. These are all matters of the highest importance, and are guarded by the law with jealous care. The same rule, therefore, is appli-

cable in this case that would be applied if the offence charged was murder. If the last clause of this portion of the charge had been omitted it would perhaps have been unexceptionable, but this clause we think qualifies all that precedes it. The limitations of the charge are substantially that unreasonable and impracticable things are not required of the prosecution, nor need the proof amount to absolute certainty; on the other hand it must not be a mere preponderance of evidence. But within these limits any degree of proof upon which as reasonable men they would act in matters of great importance to themselves would be sufficient. Men may and do act in matters of great importance to themselves upon strong probabilities, and without that degree of proof which convinces the mind and conscience. But it would be unreasonable for men in matters of the highest concern and importance to them to act without a conviction of the truth of the evidence and correctness of the result upon which they base their action. Under this charge the preponderance of proof might be so great as to produce a strong probability of the defendant's guilt, such a probability as men would act upon in matters of great importance, and yet not convince the minds and consciences of the jury beyond a reasonable doubt of the guilt of the defendant. "In all criminal cases whatsoever it is essential to a verdict of condemnation, that the guilt of the accused should be fully proved; neither a mere preponderance of evidence nor any weight of preponderant evidence is sufficient unless it generate full belief of the fact to the exclusion of all reasonable doubt." 1 *Stark. Ev.*, page 543.

We think the charge as given did not go to the full extent of the rule as settled by authorities. A new trial must therefore be granted.

EDWARD Y. McCAULEY VS. WILLIAM F. DAVIDSON ET AL.

A complaint which alleges the delivery of goods by the owner to another, and an acceptance by such other, to be carried from one place to another without reward; the loss of such goods by the bailee, and that the loss was occasioned by the gross negligence of the bailee, stating the value of the goods and the damage to the bailor, states a cause of action.

Negligence is a question of fact, or mixed fact and law, and in pleading it is only necessary to aver negligence generally, not the specific facts constituting negligence.

All bailments, whether with or without compensation to the bailee, are contracts founded upon a sufficient consideration.

This is an appeal from an order of the District Court of Ramsey County, overruling a demurrer to the complaint. A sufficient statement of the allegations of the complaint, and the demurrer thereto, appears in the opinion of the Court.

LORENZO ALLIS for Appellant.

The bill of lading on which plaintiff's action is based, shows on its face—

First—That the carriage in this case was gratuitous.

Second—That the goods were carried at the owner's risk.

I.—A carrier without hire, is required to exercise only slight care and diligence, and is liable only for gross negligence. He is not subject to the responsibilities and liabilities of common carriers, nor even to those of private carriers for reward. *Angell on Carriers*, Sec. 17, *et seq.*, pp. 19, *et seq.*; *Id.* Sec. 45, p. 48.

There are no facts alleged in the complaint which would fix liability in this case on the defendants, viewed as mere carriers without hire.

II.—But even common carriers may limit their liabilities by express contract. *Story on Bailments*, sec. 549, *et seq.*; *N. J. St. Nav. Co. vs. Merchant's Bk. of Boston*, 6 *How.*, 344; *Dor. vs. N. J. Steam Nav. Co.*, 1 *Kern.*, 485; *Parsons vs. Monteath*, 13 *Barb.*, 353; *Moore vs. Evans*, 14 *Barb.*, 524; *Merchants' Ins. Co. vs. Calebs*, 20 *N. Y.*, 173; *Wells vs. N. Y. C. R. R. Co.*, 24 *N. Y.*, 181; *Bissell vs. N. Y. C. R. R. Co.*, 25 *N. Y.*, 442.

They may agree to carry at the owner's risk, as in the case at bar. *Moore vs. Evans*, cited above.

They may, even, by express agreement free themselves from liability for their own negligence. *Wells vs. N. Y. C. R. R. Co.*, above cited.

But it is not necessary in the case at bar to hold to this last extent. The complaint shows no act of negligence or misconduct on the part of the defendants; it simply shows failure to deliver the goods carried. But since these goods were carried at the owner's risk, the defendants, even if they had carried for reward, and thus been in the condition of common carriers, would not be liable for loss of the goods unless the loss had been directly caused by some negligence or misconduct on their part.

III.—But, finally, inasmuch, as the defendants carried at the owner's risk, and without reward, they were *quoad* the plaintiff's private carriers, without hire. See especially cases 1 *Kern.*, 485, and 24 *N. Y.*, 181, above cited.

They were, therefore, liable only for gross negligence. They were in the condition of a depositary without reward.

They were not required even to exercise ordinary care and diligence like that which the law imposes on the private carrier for hire.

They were only called upon to exercise that slight degree of care and diligence which is expected of any depositary without reward.

Now the complaint does not show the want, on the defendant's part, of such slight care and diligence; nor, indeed, does it show the want of care or diligence on their part, in any degree in the

premises, nor that the loss was caused thereby. Judgment should be reversed.

SMITH & GILMAN for Respondent.

By the Court—McMILLAN, J.—The complaint avers that the defendants on or about the 8th of June, 1861, were common carriers of goods, wares and merchandise, between the ports of St. Paul and LaCrosse; that the plaintiff being the owner of two boxes goods, of the value of \$250, delivered the same to the defendants as such common carriers, who accepted and received the same on board of a certain steamboat called the Frank Steele, then belonging to the defendants and lying at the port of St. Paul, to be by said defendants safely, securely, and in a reasonable time carried for the plaintiff from said port of St. Paul to the port or town of LaCrosse, &c., and to be there safely, securely and in a reasonable time delivered by said defendants, their agents and servants, for plaintiff, to one H. J. Rumsey, and at the time of said delivery of said goods said defendants made and delivered to the plaintiff a bill of lading of said boxes and goods, which is set forth in the complaint, and is in the usual form. That though more than said reasonable time has elapsed for the delivery of said boxes and goods, yet said defendants have not delivered said boxes and goods, nor any of the same (except only one of said boxes) to said H. J. Rumsey at LaCrosse, nor to any other person, nor at any other place, for this plaintiff, but hath wholly failed and neglected so to do, nor has the plaintiff ever received the same nor any portion thereof, whereby one of said boxes and the goods therein contained, consisting of books and other things, and being of the value of one hundred and twenty-five dollars, have become wholly lost to the plaintiff, to his damage one hundred and twenty-five dollars, with interest from the first day of July, 1861, nor was said loss and damage occasioned by fire or the dangers of navigation, nor by collision, but by and in consequence of the gross negligence and carelessness of said defendants and their said agents and servants, wherefore the plaintiff prays judgment.

The defendants demur to the complaint. The only question raised by the demurrer is whether the complaint states facts which constitute a cause of action. The complaint does not aver a compensation for carrying the goods, on the contrary it expressly appears from the bill of lading that they were to be carried without reward. But the complaint avers the delivery of the goods to the defendants, and an acceptance of them by the defendants, to be transported for the plaintiff from St. Paul to LaCrosse under the special agreement set forth in the complaint.

A mandate, says Kent, is where one undertakes without recompense to do some act for another in respect to the thing bailed. The facts stated in the complaint clearly constitute, at least, this species of bailment. All bailments, whether with or without compensation to the bailee, are contracts founded on a sufficient consideration. It is not necessary to constitute a sufficient consideration to support the contract that the bailee should derive some benefit from it. It will be sufficient if the bailor on the faith of the promise parts with some present right, or delays the present use of some right, or suffers some immediate prejudice, or detriment, or does some act at the bailee's request. *Story on Bailments*, sec. 171 a.

The question of compensation may be important in determining the extent of the rights or obligations of the respective parties, or the class of bailments in which a particular transaction is embraced, but is not essential to the existence of the contract itself.

A mandatary, in the absence of any express agreement, as the contract is wholly gratuitous, and for the benefit of the mandator, is bound only to slight diligence, and responsible only for gross negligence. *Story on Bailments*, sec. 174. This general responsibility may be varied, however, by a special contract of the parties, either enlarging or qualifying or reavowing it; and in such cases the particular contract will form the rule for the case. *Id.*, sec. 182 a. In this case the parties have seen proper to make a special agreement, which is set forth in the complaint. This is in the form of an ordinary bill of lading, and acknowledges the receipt of the goods in good order and well conditioned, and by its

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terms the defendants agree to deliver them "in like good order and condition as addressed on the margin, or to his or their consignees or assigns, (unavoidable damages of fire, navigation and collision *only* excepted), upon paying the freight and charges as noted below: privilege of lighting, towing or reshipping." We have seen that the delivering and acceptance of the goods is a sufficient consideration for this contract. The defendants have seen proper by this agreement to enlarge their responsibility as mandataries so as to exclude only the unavoidable dangers of fire, navigation and collision. The complaint expressly avers the loss of the goods, and that the loss was not occasioned by fire or the dangers of navigation, nor by collision, but by and in consequence of the gross negligence and carelessness of said defendants and their agents and servants. We think the complaint avers a breach of the contract set up in the complaint.

But independent of the special contract, conceding the position of the defendants' counsel that the facts constitute the defendants merely private carriers without reward, we cannot see why the complaint does not state facts sufficient to constitute a cause of action. Negligence is a question of fact, or mixed fact and law, and in pleading it is only necessary to aver negligence generally, not the specific facts constituting negligence. *Oldfield vs. N. Y. & Harlem R. R. Co.*, 4 *Kernan*, 314; *Ware vs. Gay*, 11 *Pick.*, 106; 2 *Ch. Pl.*, 334, 343; *Id.*, 653, and note d; 2 *Greenl. Ev.*, sec. 210, note 2.

The complaint in this instance alleges the delivery of the goods, and acceptance by the defendants; the loss of the goods, and that the loss was occasioned by the gross negligence of the defendants, &c. The defendants' counsel concedes the liability of the mandatary in case of a general mandate, for gross negligence, and this, we think, is sufficiently averred. In either aspect of the case, therefore, we think the complaint states a cause of action.

The order overruling the demurrer is affirmed.

MOSES HURD VS. JOHN C. SIMONTON.

In an action to recover possession of personal property *wrongfully detained*, and for damages, the want of an allegation of demand and refusal is cured by a verdict for the plaintiff if the complaint avers generally that the defendant "wrongfully detains," &c.

The rule heretofore laid down that this Court will not review errors in the taxation of costs, unless application to correct the same is made to the District Court in the first instance, followed.

This action was brought before a Justice of the Peace in Olmsted County. The material allegations of the complaint are "that defendant has become possessed of and *wrongfully detains* one two years' old sorrel colt, &c., the property of the plaintiff." It alleges the value of the colt and that plaintiff has been damaged in the sum of \$10 by the detention, and demands judgment for the return of the property and for damages, &c. The plaintiff recovered judgment, and the defendant appealed to the District Court of that county. In the District Court judgment was also rendered in favor of plaintiff.

The notice for taxation of costs and entry of judgment was as follows :

Title -- -- "Please take notice : that the costs in the above entitled action will be taxed and judgment entered up in the above case at one o'clock P. M., on the 14th day of January, 1865, by and before the Clerk of this Court at his office," &c.

This notice was served on the defendant personally by delivering to him a copy, January 11th, 1865, at Rochester in said county, and in the words of the affidavit of service—"deponent says that on the 12th day of January, 1865, he served a copy of the within notice (notice above,) on J. A. Leonard, Esq., defendant's

attorney, by delivering a copy to the person in charge of his house, at his house in Rochester aforesaid; that said Leonard has no office in said county or State, and is now absent from the State, and he owns a house in Rochester aforesaid and lived in it prior to his departure on U. S. service, and such service was made there by this deponent."

The affidavits of disbursements do not state that they were actually paid by plaintiff except the jury fees; they state "that they have been or will be necessarily made or incurred," and such affidavits do not appear to have been served on defendant, or his attorney, or any statement of the items of costs. The costs were taxed by the Clerk and entered in the judgment. The defendant appeals from the judgment to this Court.

JONES & BUTLER for Appellant.

I.—The complaint does not state facts sufficient to constitute a cause of action.

a. There is no allegation of a wrongful taking, therefore it is conclusively presumed that the appellant came into possession lawfully, and the possession would continue to be lawful until after demand.

b. No demand is alleged, therefore it is conclusively presumed that none was made. *Stratton vs. Allen & Chase*, 7 Minn. R., 502; 3 Sand. R., 707.

II.—The judgment was noticed to be entered and "costs" taxed on the 14th day of January, 1865, "by and before the Clerk of this Court at his office," &c. Thus showing that this was neither a general or special term of the Court, and there is no direction of the Judge or Court authorizing the entry of judgment by the Clerk. *Comp. Stat., page 566, Sec. 71.*

a. No papers other than the notice were pretended to be served upon the defendant. The affidavits verifying the "costs" to be taxed, should have been served with the notice. *Rule 9, Practice in District Court.*

III.—There was no notice of adjustment of charges served upon

the appellant. The only notice in the case relates to "costs," and the entry of judgment exclusively. Such notice will not support a judgment for "charges." *Comp. Stat.*, page 578, *Sec. 9*; *Rule 14, Practice in District Court*.

IV.—There was no notice served upon appellant of the taxation of costs or charges.

The return to this Court shows that J. A. Leonard, Esq., was the attorney of record of appellant at the time of the service of the notice in this case.

The proof of service of this notice made by respondent's attorney shows the same fact.

The respondent's attorney need not have performed the useless labor of serving a copy of the notice on the appellant personally, as such service was entirely gratuitous and of no legal effect. *Comp. Stat.*, page 628, *Secs. 26, 27*; *Id.*, page 667, *Secs. 14, 15*; *Id.*, 627, *Sec. 23*.

The proof of service on J. A. Leonard, Esq., is not only insufficient, but does not pretend to come up to the statutory requirement.

That such a judgment is irregular we think well established. *Gillmartin vs. Smith*, 4 *Sand. R.*, 684; *Mitchell vs. Hall*, 7 *How. Pr. R.*, 491.

V.—The entire bill of charges is without verification except as to the jury fee, and there is no statement in detail of any portion. *Shannon vs. Brown*, 2 *Abb. Pr. R.*, 377; *Comp. Stat.*, page 578, *Sec. 9*.

a. There is no statement in any of the affidavits that any portion of the bill presented was paid by respondent, (except the jury fee,) or that he has become liable to pay any portion thereof.

CHARLES C. WILLSON for Respondent.

I.—The complaint is in the *detinet* and sufficient. As no case or bill of exceptions was made, this Court cannot know what occurred on the trial. The complaint was then amended as the Chief Justice will remember.

II.—As to the taxation of the disbursements in the judgment, the appellant was treated fairly and personally notified, (his attorney being absent.) The taxation may possibly be irregular, but the remedy would be by motion in the District Court for re-taxation, on proof of some substantial injury and excess, as well as the mere irregularity.

The appellant has mistaken his remedy. *Howard N. Y. Code, Sec. 311, and the cases mentioned in the notes to this section; Andrews vs. Cressy, 2 Minn. R., 67; Eaton vs. Caldwell, 3 Minn. R., 134; Milwain vs. Sanford, 3 Minn. R., 147; Gilmartin vs. Smith, 4 Sandf. C. R., 684, cited by the appellant.*

III.—The other complaints of technical irregularities are sufficiently transparent to require no answer here.

The appeal should be dismissed.

By the Court—BERRY, J.—It is contended that the judgment in this action should be reversed for the reason, among others, that the complaint fails to state a cause of action. The particular objection pointed out is that no demand is alleged to have been made for the colt charged to have been wrongfully detained by the defendant below. We are referred to *Stratton vs. Allen & Chase, 7 Minn., 505*, in which it was held that a complaint was fatally defective for want of such an allegation in a case similar to this. The case at bar is to be distinguished from *Stratton vs. Allen & Chase*, because here was a verdict. The rule seems to be that when a complaint is defective because a particular matter is not stated in express terms, and yet contains general allegations sufficient to comprehend such matter in fair and reasonable intendment, which allegations are such as to require proof of the particular matter in order to entitle the plaintiff to recover, the defect will be aided by a verdict in his favor. 1 *Ch. Pl., 672 et seq.; Van Sant. Pl., 530; Pub. Stat., 554, sec. 96.* The general allegation in this case is, "that the defendant *wrongfully* detains," &c. And although this may be to some extent a statement of a conclusion of law, we are inclined to hold it sufficient after verdict. For if a demand and refusal were necessary in or-

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der to make the detention wrongful, then the fact of such demand and refusal is implied in the general allegation which could not be sustained without proof of such fact. *Lambert vs. Taylor et al.*, 4 B. & C., 138. Many authorities hold that the want of an allegation of notice or demand though fatal on demurrer, is ordinarily cured by verdict. 1 Ch. Pl., 328, 330; 16 Man., 94; 9 Cush. 131.

The majority of the Court are of opinion that the remaining point made by the appellant, to wit: that the taxation of costs and disbursements below was erroneous, is not well taken here. This opinion is based upon the ground that it has been settled in numerous cases in this Court that application for the correction of alleged errors in such taxation must be made in the first instance to the District Court. No such application was made in this case.

I am not myself satisfied with this disposition of the matter, especially in view of the circumstances of this case, and of Rule 36 of the *present* District-Court rules.

But in accordance with the opinion of the majority of the Court, the judgment below is affirmed.

CHARLES A. EDGERTON et al., Ex'r., &c., vs. A. B. JONES et al.

The decision in *Dolp vs. Hollinshead*, 6 Minn., 25, followed.

Where a married woman objects to signing a deed of real property and is thereupon addressed by her husband in harsh, threatening and abusive language (though not in the presence of the acknowledging officer) and immediately thereafter in the presence of her husband she acknowledges the same to be her voluntary act, &c., the presence of the husband is a coercive presence; the acknowledgment is not taken "separately apart" from her husband in the spirit and meaning of the statute, and the instrument is ineffectual to pass her interest in the land.

Errors assigned by the defendant in error, but not complained of by the plaintiff in error, will not be regarded.

This action was brought in the District Court of Scott County by the plaintiffs, against A. B. Jones, Mary M. Jones his wife, and others, to foreclose a mortgage purporting to be executed by defendants A. B. Jones and Mary M. Jones his wife. The only issues made in the pleadings material to the points decided, are in regard to the execution and acknowledgment of the mortgage by defendant Mary M. Jones.

The complaint alleges, among other things, that the mortgage was, on the 29th of October, 1856, duly executed, acknowledged and delivered by said defendants A. B. Jones and Mary M. Jones his wife, to plaintiffs' testator.

Defendant Mary M. Jones, in her answer, admits that she signed said mortgage, but says "that neither the signing of the mortgage aforesaid, or the execution thereof, was her free or voluntary act, nor has she at any time acknowledged to any person that the same was her voluntary act or deed; * * * * * that she never has at any time been examined separate and apart from her husband in relation to the execution of said mortgage; that at the time of the execution and signing of said mortgage, one Hamilton Clark, Register of Deeds for said County, was present for the purpose of taking the acknowledgment of this defendant to the execution of said mortgage, that her said husband was also present and used undue influence and coercion towards and over this defendant to induce her to sign and execute said mortgage."

The reply denies any undue influence or coercion on the part of the husband, and alleges that the signing and execution of said mortgage was her voluntary act; that she was examined by the said Register of Deeds separate and apart from her said husband, and that she acknowledged that she executed the same freely and of her own accord, and without fear or compulsion from any one.

The cause was tried before a referee. On the trial the plaintiffs put in evidence the mortgage duly signed by said Jones and wife, attested by two witnesses, with a certificate of the acknowledgment of the same by said Jones and wife in the usual form, signed by said Register, with his official seal attached.

On the part of the defence a witness was then produced and sworn, whose testimony was offered for the purpose of proving that before said Mary M. Jones signed said mortgage she objected to signing the same; that her husband, in order to induce her to sign the same, used towards her harsh, threatening and coercive language; to which evidence the plaintiffs objected upon the following grounds:

“1. That said evidence is immaterial.

“2. That it is incompetent.

“3. That no proper foundation has been laid in the pleadings by allegations of fraud or otherwise to enable the defendants or either of them to contradict said official certificate by parol evidence.”

Which objections were overruled by the Court. The plaintiffs excepted, and the evidence was admitted. It was further offered to prove by said witness that the examination of said Mary by the officer who made said certificate, was not separate and apart from her said husband, but was in his presence. The same objections were made by plaintiffs as before, which objections were overruled by the Court. The plaintiffs excepted, and the testimony was admitted. The finding of the referee so far as material to the points decided appears in the opinion of the Court. Judgment was entered pursuant to the decision of the referee. The plaintiffs sue out a writ of error and remove the cause to this Court.

W. K. GASTON for Plaintiffs in Error.

L. M. BROWN for Defendants in Error.

By the Court—BERRY, J.—The first error complained of is that the referee before whom this case was tried admitted parol testimony to contradict the official certificate of the acknowledgment of the mortgage to which this action relates. This identical question was before this Court in *Dodge vs. Hollinshead*, 6 Minn., 25, and parol evidence was held to be admissible for that purpose. The case was fully argued, and an elaborate opinion delivered.

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We acquiesce in the conclusion arrived at so far as the case at bar is concerned. It may be quite true that the construction there given to the statute will sometimes operate with great hardship upon an innocent purchaser; but so long as it is the policy of our law to guard the rights of married women by a peculiar form of acknowledgement, any construction which would preclude them from showing that the statements contained in the certificate were untrue, would operate with equal hardship upon their interests, and would render the statute a mockery. And if it be said that for a false certificate by which a married woman was prejudiced, she might have a remedy against the certifying officer, the answer is that the other party might have the same. The allegations in the answer of Mary M. Jones were sufficient to let in the parol evidence. The facts as she alleges them to be, were set out, and it was not necessary for her to go further and allege fraud, mistake or accident. In order to pass her interest in the property it was necessary for her to acknowledge the instrument of conveyance in the manner prescribed by law, for it is to be observed that in case of a married woman the statute is imperative in requiring an acknowledgement to render the conveyance effectual, while in regard to other grantors it is simply permissive. The question then is, did Mary M. Jones convey as the statutes authorized her to do? for as she derived all her power to convey from the statute, anything short of a compliance with statutory requirements would be ineffectual. The referee finds as facts, "that before the said Mary Martha Jones signed the said indenture of mortgage she objected to signing the same, and expressed her unwillingness so to do, but said objections were not made or such unwillingness expressed in the presence of said Gurdon H. Edgerton (the mortgagee), or of any person representing or acting for him, nor in the presence of the said Hamilton Clark, the said register of deeds (who took the acknowledgement), that when she so objected to executing the said mortgage, her husband used toward her harsh, threatening and abusive language, but not in the presence of the said Gurdon H. Edgerton or his agent, or the said officer, that immediately after her husband had used toward her said threats, he

and she entered the room where the said officer was waiting with the said mortgage, that she in the presence of her husband and the said officer, and Mary Elizabeth Jones, signed the mortgage, and it was witnessed by the said Hamilton Clark (the said officer) and the said Mary E. Jones; that the said officer there in the presence of her husband and the said Mary E. Jones, asked the said Mary Martha Jones if her signature to the mortgage was made or done voluntarily and of her own free will and accord, and she answered 'yes;' and that she did not otherwise, or at any other time or place, execute or acknowledge the execution of said mortgage." As a corresponding conclusion of law, the referee finds "that the said mortgage was not so executed and acknowledged by the said Mary Martha Jones, wife of said A. B. Jones, as to make the same legal or valid against her, or binding upon her title to or estate in the premises therein described, or intended to be." We think this is good law. The statute provides that "the acknowledgement of the wife shall be taken separately apart from her husband." No form of conveying is allowed to a married woman except on this condition. We shall not undertake to fully define the phrase "separately apart." But we have here a case in which it is not only found that the mortgage was signed and acknowledged by the wife in the presence of her husband, but that this was done immediately after she had expressed an unwillingness to sign the deed, and had thereupon been addressed by her husband in harsh, threatening and abusive language. Whatever other or further construction it may be necessary in a proper case to put upon the statute, it is clear that the object was to secure to the wife freedom of action, especially from the influence of her husband, in executing deeds of real property. We are clear that in this case his presence under the circumstances was not permitted by the statute. It was a coercive presence. The spirit and meaning and intention of the law were violated, and the mortgage and acknowledgement, as far as she was concerned, were properly held insufficient to pass her estate. On the point that the mortgagee, Gurdon H. Edgerton, was entirely ignorant and innocent in this matter, we think on grounds before stated that this

was not important. And further, he had no right to be ignorant of the manner in which the mortgage was executed and acknowledged. It ran to him. He was not obliged to take it or advance money on it. If he saw fit to do so without making prudent inquiry, it was his own misfortune. We believe that these views dispose of all the matters of error assigned by the plaintiff. Certain errors were also assigned in the points of the defendant in error which are not complained of by the plaintiff in error. We do not understand it to be the privilege of the defendant in error to take this course. If he desires that the judgment below should be examined on his own behalf, and on account of errors prejudicial to himself, he can have a cross writ. *Reynolds vs. Davis*, 2 *How. Pr. R.*, 104, *pr. Bronson, C. J.*; *Buckhead vs. Brown*, 5 *Hill*, 63; *Smith vs. Sackett*, 15 *Ill.*, 536. And under the present New York practice, in which the writ of error seems to have been in the main superseded by an appeal, it is held that only the objections which the *appellant* raises can be considered on appeal, unless upon a modification of the order or judgment appealed from it may become necessary to look at those raised by the respondent. *Robins vs. Codman*, 4 *E. D. Smith*, 315; *Rooney vs. Second Avenue R. R.*, 18 *N. Y.*, 368; *Bell vs. Holford*, 1 *Duer*, 71. In the latter case, Duer, Justice, says that the party by his omission to appeal from the judgment "has precluded himself from denying its justice or propriety. He has virtually assented to the judgment as it stands." The same principle would seem to apply to writs of error.

Judgment affirmed.

STATE OF MINNESOTA ex rel. D. A. SECOMBE vs. THE CITY OF
ST. ANTHONY.

The 9th section of an act approved Feb. 28, 1860, entitled "An act for the support and better regulation of common schools in the City of St. Anthony," is in the following language: "That whenever said board [of Education] shall deem it necessary to purchase or erect a school house or school houses for said district, or to purchase a site or sites for the same, they shall call a meeting of the legal voters in said district, by giving at least ten days notice of the time and place and object of said meeting in some newspaper printed in and in general circulation in said district; and the President of said Board, and in his absence one of the other directors, shall act as chairman of said meeting, and said meeting may determine by a majority vote upon the erection of a school house or school houses, and the purchase of a site or sites therefor, and the amount of money to be raised for the purpose aforesaid; which money so voted shall be thereupon certified by the Board of Education, by its President and Secretary, to the City Council; and thereupon the said City Council shall within thirty days thereafter proceed to levy such amount of money upon the taxable property in said district; said tax to be levied and collected as other taxes of said city are levied and collected, and to be paid over as soon as collected to the Treasurer for said Board of Education." *Held*—on an application for mandamus, that under this section,—1. A preamble in the following language, "Whereas it is deemed necessary by the Board of Education of the City of St. Anthony to purchase a site or sites and to erect thereon a school house or school houses for the school district comprised within the limits of the said city of St. Anthony," &c., adopted by said Board, with a resolution calling a meeting of the legal voters, was sufficiently definite to justify them in calling such a meeting. 2. That the meeting of legal voters must determine upon the number of houses to be erected and the number of sites to be purchased, and must specify a definite and certain sum of money for such purpose, and that this action must precede the levying of the tax.

This is an application for a peremptory writ of mandamus, upon the relation of David A. Secombe, to compel the City Council of St. Anthony to levy a tax, &c.

The contents of the information upon which such writ is prayed for are sufficiently set forth in the opinion of the Court.

D. A. SECOMBE for the Application.

WM. LOCHREN for City of St. Anthony.

By the Court—McMILLAN, J.—By an act of the Legislature approved February 28th, 1860, entitled "An act for the support and better regulation of common schools in the City of St. Anthony," it is provided that the City of St. Anthony from and after the first Tuesday in March next after the passage of the law, shall constitute but one school district. The act also provides for the election of a board of six directors, and prescribes the mode of their organization and qualification, and creates them a body politic and corporate under the style of "The Board of Education of the City of St. Anthony," and confers upon them sundry corporate powers.

The ninth section of the act is as follows: "That whenever said board shall deem it necessary to purchase or erect a school house or school houses for said district, or to purchase a site or sites for the same, they shall call a meeting of the legal voters in said district, by giving at least ten days' notice of the time and place and object of said meeting in some newspaper printed in and in general circulation in said district; and the president of said board, and in his absence one of the other directors, shall act as chairman of said meeting, and said meeting may determine by a majority vote, upon the erection of a school house or school houses, and the purchase of a site or sites therefor, and the amount of money to be raised for the purpose aforesaid, which money so voted shall be thereupon certified by the Board of Education, by its President and Secretary, to the City Council; and thereupon the said City Council shall, within thirty (30) days thereafter, proceed to levy such amount of money upon the taxable property in said district; said tax to be levied and collected as other taxes of said city are levied and collected, and to be paid over as soon as collected to the Treasurer for said Board of Education."

Proceeding under this section the Board of Education at a regular meeting adopted the following resolution: "Whereas it is deemed necessary by the Board of Education of the City of St. Anthony to purchase a site or sites and to erect thereon a school house or school houses, for the school district comprised within the limits of the said city of St. Anthony, now therefore, be it

"Resolved, By said Board of Education, that a meeting of the legal voters of said school district be called and that the same be held on the 20th day of June, A. D. 1865, at seven and one half o'clock P. M. of that day in the City Council room of said City, for the purpose of determining upon the erection of such school house or school houses and the purchase of a site or sites therefor, and the amount of money to be raised for that purpose, and that notice of said meeting be given," &c., prescribing fully the notice to be given.

The meeting of the legal voters was regularly held pursuant to the notice, and by a majority vote adopted the following resolution:

"Resolved, That this meeting determine upon the erection of a school house or school houses in this district and the purchase of a site or sites therefor, and that the amount of two (2) per cent. on the assessment of the city of the present year be raised for the purpose aforesaid, the said site or sites and the kind of house or houses to be determined hereafter by the district."

This resolution was regularly certified to the City Council of the City of St. Anthony, and the City Council refused to levy the tax.

The relator, David A. Secombe, now applies for a peremptory mandamus to compel the levy of the tax. Several objections are urged to granting the writ which we proceed to consider. The first objection urged by the respondent is that the resolution of the *Board of Education* calling the meeting of legal voters is insufficient, because they came to no definite conclusion as to the necessity of building houses or purchasing sites, nor did they decide whether one or twenty houses or sites are necessary.

The judgment of the board as to the necessity for a school house or school houses, &c., is only preliminary, and for the purpose of calling the meeting of legal voters. The authority to de-

termine upon the purchase of sites or the erection of houses under this section is vested in the meeting of voters and not in the Board of Education. The power of the meeting is not limited or controlled by the action of the board, but when convened the power of the meeting is general and exclusive. The power of the board to call a meeting of the legal voters of the district does not depend upon the number of houses or sites they deem necessary to erect or purchase, but upon the necessity for *any* such erection or purchase; if this necessity is deemed by the board to exist it is all that can be required, for no subsequent action requires greater certainty; and except for the purpose of calling the meeting, the judgment of the board is immaterial. It, therefore, the calling of the meeting is not of itself sufficient in any case to show the existence, in the judgment of the board, of the necessity contemplated by the act, certainly the resolution of the board in the language of the statute shows the necessity in their judgment of the erection of one or more school houses; the exact number is unimportant since the meeting must determine the number to be erected irrespective of the judgment of the board. This objection is not well taken.

The second, third and fourth objections go to the action of the meeting of voters and may be considered together. It is urged that the action of the meeting is void, because it does not determine definitely the number of school houses to be erected or sites to be purchased, nor the amount of money to be raised.

In the distribution of the powers conferred by this act, the Legislature have carefully distinguished between the establishment and maintenance of schools provided for in this act, and the purchase of sites and erection of school houses for the district.

By the sixth section of this act it is made the duty of the Board of Education to establish certain schools in the district as soon as funds are realized for the purpose, and the eighth section requires them to report to the City Council of St. Anthony the amount of taxes they deem necessary to be raised to defray all the incidental expenses of maintaining said schools during the current year, and provides for its levy and collection. And throughout

the whole act it will be seen that the board have complete and entire control of the establishment and maintenance of the schools, and are furnished with all the means and powers necessary for this purpose.

But by the ninth section of the act—cited *ante*—the power to determine upon the erection of school houses and the purchase of sites therefor, and the amount of money to be raised for that purpose, is conferred upon the meeting of legal voters of the district mentioned in said section. There can be no doubt that the power conferred by this section is general, extending to all school houses and sites erected or purchased under this section, and we think it is equally evident that it was the intention of the act to confer this power exclusively upon the voters. Whatever, therefore, is an exercise of this power must be done by the meeting and not by any other body—the action of the meeting then must be full and complete in itself; to render it so we think it is necessary that it should be definite and certain as to the number of houses to be erected, and sites to be purchased, for if the action be indefinite, as it is in this instance, in regard to the number of houses and sites, how can it be ascertained whether the meeting determined to erect one house or ten houses, to purchase one site or ten sites? and if the board should undertake to determine for themselves the number to be erected, it would be the exercise of power not possessed by them. Again, the sum of money voted to be raised must be used for the purpose determined by the meeting. The sum raised must have reference to the purposes determined upon. It would seem therefore that the purpose must be definite and specific, otherwise how can the board ascertain whether they shall apply the fund to the erection of one house and one site, or ten houses and ten sites, or one house and ten sites? Clearly there is no means of ascertaining, and if the board can proceed at all, they may apply the fund at their discretion, which we cannot believe was intended by this act; for we distinctly gather from the letter and the spirit of this law the intention to limit the power and restrict the discretion of the Board of Education in the erection of buildings and the purchase of sites for the schools of the district.

We think, too, that the amount of money to be raised must be designated by a certain gross sum. It would be difficult to use language which would convey this intention more plainly than this act does. Not only the language but the subject matter of the law shows that a gross sum was intended. The amount to be raised must be for a certain purpose previously determined by the meeting, therefore it *could* be estimated; it is to be raised by tax, it must therefore be a certain sum. There are various reasons why the method adopted in this instance of determining the amount to be raised is insufficient. It is admitted in this case that the assessment for the present year was not completed at the time of this meeting, they could not therefore have known the amount which their action would yield. Again, the assessment roll is not equalized until a much later period, and changes may be and are continually made in it, by corrections and additions materially changing the amount as well at as prior and subsequent to the equalization. The sum actually raised, therefore, by a levy of two per cent. on the assessment may fall far short or may far exceed the amount required for the purposes determined by the meeting, and might materially affect their action in the premises. But again, the act prescribes that upon the amount voted being certified to them, the City Council shall proceed "to levy such amount of money upon the taxable property in said district." How can they levy the amount when it is uncertain? Other reasons suggest themselves which we need not consider. The action of the meeting is clearly insufficient in not determining upon a certain sum for the purpose mentioned.

Nor are these defects cured or obviated by the closing language of the resolution: "The said site or sites and the kind of house or houses to be determined hereafter by the district." Admitting that the word "district," as here used, applies to the meeting of voters—which may well be doubted—the language just cited does not purport to affect the question as to the *number* of houses to be erected, nor except by implication, if at all, as to the number of sites, and certainly not as to the amount of money to be raised. But admitting that it referred the determination to a subsequent

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meeting, clearly until the determination is made, a mandamus could not issue to levy the tax.

We are of opinion, therefore, that the meeting of legal voters must determine upon the number of houses to be erected, and the number of sites to be purchased, and must specify a definite and certain sum of money for such purpose, and that the action must precede the levying of the tax.

The mandamus is denied.

GILMAN CONNOR VS. THE BOARD OF EDUCATION OF THE CITY OF
SAINT ANTHONY.

The fact that a complaint does not ask for the proper relief, or asks for inconsistent relief, is not ground of demurrer.

Where the equitable estate to certain premises were transferred from a school district and vested in the Board of Education of Saint Anthony, and to secure the property and legal title thereto the said Board contracted to pay the purchase price of the premises, in pursuance of an agreement entered into between the owner of the premises and such school district, it was not a purchase within the meaning of *section 9* of the act incorporating the Board of Education, and the contract is valid.

This action was commenced in the District Court for Hennepin County. The allegations of the complaint are substantially as follows: That the defendant is a corporation organized and acting under an act entitled "An act for the support and better regulation of common schools in the City of St. Anthony," approved February 20, 1860; that in the month of June, 1858, the trustees of school district number 3 of St. Anthony, (which district was then duly organized, &c.,) bargained with plaintiff for a certain lot of land, lying within the limits of said district, for a site for a school house, and agreed to purchase the same of plaintiff for the

sum of \$500, to be paid in six months; that plaintiff executed to said trustees a bond for a deed of said lot upon the payment of said sum when due; that thereafter, and before said sum of money became due said trustees built a school house for said district on said lot; that by the provisions of an act of the Legislature of the State of Minnesota, entitled "An act to amend an act entitled an act to incorporate the City of St. Anthony, approved March 3, 1855," approved March 10, 1860, said lot became a part of the city of St. Anthony, and ever since has so remained; that said trustees never paid any part of said \$500, and plaintiff never executed to them a deed of said lot; that on the 14th day of June, 1861, plaintiff executed a warrantee deed of said lot to defendant solely upon the consideration of the execution by defendant to plaintiff of a certain agreement set out in said complaint, which is as follows: That the defendant covenants and agrees with plaintiff, in consideration of said deed, "which deed was made out and executed by said Connor in pursuance of a bond made by said Connor for the conveyance of said real estate (said lot,) to the trustees of school district No. 3, that said board of education shall pay to the said Gilman Connor on the first day of September, A. D. 1861, \$50; on the first day of June, 1861, \$100; on the first day of September, 1862, \$50; on the first day of June, 1863, \$100; on the first day of September, 1863, \$50; on the first day of June, 1864, \$100; on the first day of September, 1864, \$50; and said sums shall draw interest at the rate of seven per cent. per annum from this date until paid, said interest to be paid annually.

"St. Anthony, June 14, A. D. 1861."

That said deed was recorded July 3, 1861; that defendant was in possession of said lot before the making of said agreement, and has been ever since; that defendant paid plaintiff September 1st, 1861, \$50.75, and has not paid and refuses to pay any further sum. The plaintiff demands judgment for \$450 and interest, &c., or in case the Court should hold that the said agreement of the defendant is invalid, *then* the plaintiff demands that the said deed be annulled and set aside, &c., and such other or further relief, &c.

The defendant demurred to the complaint upon the ground—

First—That several causes of action have been improperly united in the said complaint. The complaint mingles and combines a demand upon contract for the payment of money, with a demand for the cancellation of a deed, upon the ground of want of consideration.

Second—The said complaint does not state facts sufficient to constitute a cause of action.

The demurrer was overruled by the Court below, and the defendant appeals from the order overruling the same to this Court.

MERRIMAN & LOCHREN for Appellant.

I.—The plaintiff, in his complaint, improperly unites two causes of action:

First—A demand on contract for the payment of money.

Second—A demand that a deed be cancelled for want of consideration.

The first falls under the second class designated in *sec. 86, page 543, Pub. Stat.*, and the second under neither of the classes. But the causes of action which may be united "must belong to one only of these classes." *Sub. 7, same section.* The causes of action set forth in the complaint cannot be united in the alternative because repugnant to each other. 1 *Bar. Ch. R.*, 329; *Maxwell vs. Farnham*, 7 *How. P. R.*, 236.

Demurrer is the proper remedy. *Pub. Stat.*, *p. 540, sec. 65, sub. 5*; *Stannard vs. Muttice*, 7 *How. P. R.*, 4; *Van San. Pl.*, 677, 678, 679.

II.—The plaintiff cannot recover upon the contract. The persons who executed it had no authority to make it on behalf of the defendant. Section 9 of the act incorporating defendant defines the powers and duties of defendant and its officers in respect to the procuring of school houses and sites therefor. The power to make this or any contract in relation thereto, or to create any debt or liability on that account, is not among the powers granted. *See whole act, and especially sec. 9*; *School Dist. vs. Thompson*, 5 *Minn. R.*, 280; *McCulloch vs. Moss*, 5 *Denio*, 567; *Angell*

& *Ames on Corp.*, secs. 23, 24; 2 *Kent's Com.* pages 278, 279, 299; *Hodges vs City of Buffalo*, 2 *Denio*, 110.

III.—The deed cannot be cancelled for want of consideration. It is immaterial whether plaintiff received any consideration or not so long as there was no fraudulent practice on the part of grantee. *Chitty on Contracts*, p. 5; *Centre vs. Billinghamurst*, 1 *Cow.*, 33; *Dow vs. Munsell*, 13 *John.*, 430; 1 *Par. on Con.*, 354; *Willard's Eq.*, 304.

Nor can a party to a deed impeach it upon the ground of fraud as to consideration—though otherwise when the fraud relates to the execution. *Osterhoul vs. Shoemaker*, 3 *Hill*, 513; *Jackson vs. Hills*, 8 *Cow.*, 290; *Framhot vs. Leach*, 5 *Cow.*, 506; *Champion vs. White*, 5 *Cow.*, 509; *Jackson vs. King*, 4 *Cow.*, 207; *Jackson vs. Gemmy*, 16 *John.*, 189; 20 *John.*, 130.

IV.—The plaintiff has no equitable lien for purchase money.

But the agreement is void; and every act or thing therein or thereby evidenced, as done or promised by, for or in behalf of the defendant was unauthorized, and not the act of the defendant. *See authorities cited under second point.* Hence it nowhere appears that there are any negotiations between the parties, or that any purchase price was agreed upon, or that any bargain and sale was ever consummated. Therefore there can be no lien for purchase money.

V.—The defendant was by law authorized to receive “a gift, grant, donation or devise,” (*see act of incorporation, Sec. 3*), and hence to receive this deed. The conveyance was voluntary. It is a conveyance executed, and being good in law, is sufficient likewise in equity, (*Fonblanque's Eq.*, 1 *Vol.*, 348; *Leading Cases in Eq.*, 213, *White & Tudor*.) and having been made with a full knowledge of all the facts, cannot be avoided on the ground of ignorance of the legal consequences which flow from those facts. *Willard's Eq.*, 62, 63; *Shotwell vs. Murray*, 1 *John. Ch. R.*, 513; *Lyons vs. Richman*, 2 *John. Ch.*, 51; *Storrs vs. Barker*, 6 *John. Ch.*, 166; *Champion vs. Laytin*, *Bronson's Opinion*, 18 *Wend.*, 417; *Clerk vs. Dutcher*, 9 *Cow.*, 674; *Gilbert vs. Gilbert*, 6 *Bar.*, 532; *Arthur vs. Arthur*, 10 *Bar.*, 10.

VI.—In any event the plaintiff here is not in a position to demand such relief as will in any manner affect the title of defendant to the land described, or defendant's possession thereof, nor to demand that the same be incumbered by a vendor's lien, nor to ask the rescission of any deed thereof, nor the performance of any contract in respect thereto; because

First—It does not appear from the complaint that plaintiff ever had any right, title or interest in or to the land, not even a naked possession.

Second—It does appear from the complaint that defendant was in the possession and use of the land prior to the making of the deed by plaintiff, and independently of that or any act of plaintiff. In this aspect of the case plaintiff has no interest in the subject matter, no title to institute the suit, no equity. *Story's Eq. Pleadings*, Secs. 261, 262, 503 to 514.

Bills for specific performance should allege title, (*Equity Draftsman*, pages 74, 75, 79, 83; *Van Santvoord's Precedents*, 66,) so also bills for the cancellation of deeds, &c. *Equity Draftsman*, pages 220, 226.

D. A. SECOMBE for Respondent.

I.—The complaint sets forth only one cause of action. It contains allegations of fact all of which pertain to the same transaction, or to transactions connected with the same subject of action. 7 *Minn.*, 351; 3 *Sanford's R.*, 668; 6 *How. Pr. R.*, 131; 5 *Id.*, 478; 11 *Id.*, 201; 12 *Id.*, 441; 2 *Kernan*, 341.

II.—The defendant is the legal successor of the old school district, No. 3, and as such, without any agreement or contract on its part, is subject to the liability which existed against the said school district No 3, which is set out in the complaint. *Robbins vs. School District No. 1, Anoka County*, 10 *Minn.*, 340.

III.—If, however, the defendant is not so liable, then in order to determine the relations between the plaintiff and defendant as to the lot in question, the deed and the writing made by the defendant at the same time in relation to the same subject, must be

considered together as forming parts of the same transaction and contract; and if the defendant had not the legal capacity to make such a contract the whole transaction was void. 5 *Pick.*, 395; 10 *Id.*, 250; *Id.*, 302; 1 *Johns. Cases*, 91; 3 *Wend.*, 233.

IV.—In any event the land itself is subject to the vendor's lien for the purchase money upon the purchase by the school district No. 3 from the plaintiff. 4 *Kent*, 152; 4 *Minn.*, 72; 6 *Id.*, 450; 43 *Barbour, Dubais vs. Hull*.

V.—In construing every contract the intention of the parties thereto must govern, and in this case there is no evidence of an intention on the part of the plaintiff to give the lot in question to the defendant.

VI.—The defendant either as the successor of the old school district, or independently, claiming as grantee of the plaintiff, is estopped to deny the title of the grantor. 1 *Greenl. on Evidence*, Sec. 24.

VII.—It is competent for the Court in this case to grant the plaintiff any relief consistent with the case made by the complaint and embraced within the issue. 7 *How. Pr. R.*, 423; 4 *Id.*, 308; 3 *Code R.*, 8.

By the Court—McMILLAN, J.—The complaint in this case contains but one cause of action. A single state of facts is set up upon which the plaintiff asks for alternative relief.

If the facts stated entitle the respondent to relief the complaint is sufficient; the fact that the plaintiff does not ask for the proper relief, or asks for inconsistent relief, is not ground of demurrer. *Young vs. Edwards*, 11 *How. Pr.*, 203; *McCosker vs. Brady*, 1 *Barb. Ch.*, 341-2; *Emery vs. Pease*, 20 *N. Y.*, 62; *Beale vs. Hayes*, 5 *Sand.*, 640; *Meyer vs. Van Cottler*, 7 *Ab. Pr. R.*, 222.

The second ground of demurrer is that the complaint does not state facts sufficient to constitute a cause of action.

The first point raised by the defendant in support of this objection is that the plaintiff cannot recover upon the contract, because the Board of Education had no authority to make it. The Board of Education of the City of St. Anthony was incorporated

by an act of the Legislature approved February 28th, 1860.

By the ninth section of the act of incorporation it is provided among other things: "That whenever said board shall deem it necessary to purchase or erect a school house or school houses for said district, or to purchase a site or sites for the same, they shall call a meeting of the legal voters in said district, * * * and said meeting may determine by a majority vote upon the erection of a school house or school houses, and the purchase of a site or sites therefor," &c.

If the contract in this case is a purchase of a school house or site therefor, within the meaning of this section, the objection is clearly well taken. To determine this it is necessary to advert to the legislation affecting the question. The City of St. Anthony as originally incorporated embraced within its limits, among other territory, section 25, T. 29, R. 24 west. By an act approved March 1, 1856, this section was excluded from the corporate limits, and by an act approved March 10, 1860, it was again embraced within the city.

It appears from the complaint that in June, 1858, school district No. 3 of St. Anthony was a duly organized and acting school district, embracing within its limits the lot mentioned in the complaint. That in that month the plaintiff bargained and sold this lot to said school district, and executed to the district a bond for a deed on the payment of five hundred dollars in six months thereafter, that the district entered into possession and erected a school house thereon, but have never paid any portion of the purchase money. Under these circumstances school district No. 3 acquired the equitable title to the premises, and upon the payment of the purchase money would be entitled to a conveyance of the legal estate, and a court of equity would regard the bond as an agreement to convey, and would compel the specific performance of the agreement. *St. Paul Div. No. 1 Sons of Temperance vs. Brown & Bass*, 9 Minn., 157.

This was the state of the title to this lot at the time of the passage of the act approved March 10, 1860, which embraced section 25, including this lot, in the city of St. Anthony. Prior to and at
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the time of the passage of this act by the act incorporating the defendant, the city of St. Anthony constituted but one school district. By the act of March 10th, therefore, the lot in question was detached from school district No. 3 and incorporated into the school district composed of the city of St. Anthony.

By section 10 of the act incorporating the defendant it is provided among other things, "that the title to all real estate and other property belonging for school purposes to the said city of St. Anthony, or any part thereof, shall be regarded in law as vested in the Board of Education and their successors in office, for the support and use of common schools therein," &c. By an act approved March 7, 1861, each and every township organized, or that might thereafter be organized, was constituted a school district and body corporate, &c., and by the second section of the act it is provided that every such school district shall hold in the name of its trustees and their successors in office, the title of all lands and other property then held or which might thereafter be acquired for school district purposes in any such town, excepting corporate cities, and towns which are made bodies corporate by and under chartered privileges granted by any special act of the Legislature of this State, in which case *the title of all such property shall be held in the corporate name of such town or city for the use of common schools therein.*"

At the time of the passage of this act the premises in question were embraced within the corporate limits of the city of St. Anthony, and constituted part of the school district composed of that city; therefore, admitting that the interest of school district No. 3 in the premises was unaffected by the prior legislation and the equitable estate remained in it, by the act of 1861 this estate was transferred to and vested in the corporate authorities of the city of St. Anthony. This being the case, by the tenth section of the act incorporating the defendant, the title vested in the defendant, the Board of Education. School districts being *quasi* corporations, are under the control of the Legislature. They may be changed and divided at the legislative will, and property may be thus transferred from one organization to another. It was not in

the power of the Board of Education to refuse this estate—it was vested in it by the act creating the corporation—it was cast upon them by operation of law. The necessity for purchasing the premises or erecting a school house was not to be considered by the board, nor was the district meeting to determine upon the purchase; the acquisition of the property had already been determined by the Legislature. It was not, therefore, we think, a purchase within the meaning of section nine of the act above cited, and the provisions of that section are not applicable to the case.

But the estate thus cast upon the defendant was only an equitable estate in the premises. This estate, by neglect to perform the conditions of the bond, might be determined, and the premises be lost to the district. To preserve the estate to the district the legal title must be acquired, and this could only be done by payment of the purchase money.

By section 3 of the act of incorporation it is provided that the board shall be capable of contracting and being contracted with, and shall be capable of receiving any gift, grant, donation or devise made for the use of common schools in said city, &c.; and by section 5 of the act “that said Board of Education shall have the entire management and control of all the common schools in said city of St. Anthony, and of *all the houses, lands and appurtenances* already provided and set apart for common school purposes, as well as those hereafter to be provided for the same purpose,” &c.

The imposition of the duty to manage and control the houses, lands and appurtenances, implies the duty to preserve the same and the power to use the means necessary to such preservation. It was, therefore, we think, the duty of the Board to preserve to the district the property and estate vested in the district in this instance, and to do so it was necessary to pay or contract to pay the purchase money of the lot, and the power to contract being expressly given to the Board, we think the contract by the Board by which they obtained the legal title to the premises, is valid and binding. It is expressly stated in the contract with the Board that the deed of conveyance of the premises was in pursuance or

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the original agreement with school district No. 3, and it is also averred in the complaint that at the time of making the deed and contract with the Board, and prior thereto, the defendant was in the occupation of the premises. These facts, we think, clearly show that the transaction was not an original purchase by the Board, but a mere performance of the original agreement, by which the estate was preserved and secured to the district represented by the Board of Education. Conceding that the plaintiff might have had a remedy against school district No. 3 upon their agreement, we think the plaintiff has waived that right by his agreement with the present defendant. Since the defendant acquires not only the lot purchased, but also the building erected thereon by school district No. 3, there is certainly nothing inequitable in the former paying the purchase price of the lot.

The order overruling the demurrer is affirmed.

MARY E. TAPLEY VS. GEORGE W. TAPLEY et al.

A motion to dismiss an action based on the ground that the plaintiff is a married woman suing alone, and so the Court has no jurisdiction of her person, should be denied. The objection goes to her capacity to sue, and must be taken by answer or demurrer.

Threats by a husband to separate from his wife, accompanied by general abusive treatment, will constitute duress so as to avoid a deed executed by her under a reasonable apprehension that they will be carried into effect.

This action was brought in the Dakota County District Court, by the plaintiff against the defendants, George W. Tapley, Martin O. Walker, Samuel S. Carll and Robert Buck. The material allegations of the complaint are substantially as follows: On or about the 25th November, 1858, the plaintiff (then Mary E. Barker,) intermarried with defendant, George W. Tapley. On the

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13th April, 1859, the father of plaintiff conveyed to her 80 acres in Dakota County (described in the complaint,) for her exclusive use and benefit. On the 1st September, 1860, plaintiff and her husband executed a conveyance of the premises to the defendant Buck, but such conveyance was not recorded, and was afterwards returned to said defendant Tapley. On the 15th November, 1861, plaintiff and her husband executed a conveyance of the lands to the defendant Carll, which was recorded. The conveyances to Buck and Carll are alleged to have been made without any consideration, and were executed by the plaintiff in consequence of the threats of her husband that he would separate from and not support her, ill-treatment, abuse, and in some instances actual personal violence of her husband, used and employed to induce the plaintiff to execute the same, so that he might obtain the title to or the price and value of said land for his own benefit. After the conveyance to Carll, defendant Tapley drove plaintiff from his house, and has since refused to receive her back, or to live with her, or in any manner to contribute to her support. That the land is improved and was at the time of the conveyance of the same to the plaintiff by her father, and still is of the value of \$1,000. On the 23d January, 1863, at the instance of defendant Tapley, said Carll and his wife, without any consideration, conveyed the land to the defendant Walker for the benefit of defendant Tapley, and that said Walker had notice and knowledge of the prior deeds to Buck and Carll, and the purpose for which the same were obtained, and of the means used and employed by defendant Tapley to induce the plaintiff to execute the same, and of all the circumstances attending their execution. * * *

Plaintiff prays judgment, declaring the deeds to Buck, Carll and Walker fraudulent and void, and that said defendants, their agents, &c., may be enjoined and restrained from selling or in any way incumbering said land, &c. The defendant Walker answered, denying the whole complaint, except the fact of the conveyance to the plaintiff by her father, and the deed from plaintiff and her husband to Carll, and the deed from Carll and wife to him. The answer states that defendant Walker for about five years up

to about the middle of January, 1863, was engaged in business in Hastings, Dakota County, and that during all that time defendant Tapley was his agent in conducting such business, receiving and disbursing all moneys arising therefrom. That when the land was conveyed to plaintiff by her father, the same was wholly unimproved and worth no more than \$200; that Tapley after such conveyance expended about \$1,500 in making improvements thereon, and that the money belonged to this defendant, and was expended without his knowledge or consent. In January, 1863, this defendant had a settlement with said Tapley concerning his agency, and upon an accounting, Tapley was found to be indebted to this defendant in the sum of \$1,440, in payment of which sum Tapley procured the conveyance of the land in question (with other lands,) from said Carll and wife to this defendant. * *

The reply denied the whole answer, except the allegation of the agency of defendant Tapley. The cause was brought to trial in June, 1864. On the trial the plaintiff testified as follows: "I am the plaintiff in this action; was married November 5th, 1858, to the defendant Tapley; have ever since been and now am his wife," &c. * * * The witness was asked the following questions:

First—"State whether or not you would have signed the Carll deed had it not been for the acts, threats and doings of your husband Tapley in relation to this land?"

Second—"State whether or not you did not sign the deed to Carll to prevent injury to your good name?"

Third—"State whether or not you ever freely or voluntarily signed the Carll deed?"

Fourth—"Did you sign the deed and acknowledge same without fear of any one or without restraint from any one?"

Fifth—"Should you have acknowledged the Carll deed except for the threats of your husband?"

Sixth—"State whether or not you voluntarily delivered the deed to Carll?"

The questions were all objected to as being incompetent, irrelevant, &c., and the second and fifth questions were also objected

to as leading. The objections were overruled and the answers admitted under exceptions taken in due time.

The direct examination of the witness here closed, and the counsel for defendant moved to dismiss the action on the ground that the testimony shows that the plaintiff is the wife of defendant George Tapley; that there being other defendants joined with him in the action, plaintiff had no right to commence the same except by her next friend, and the Court could acquire no jurisdiction of the person of plaintiff; that the question of jurisdiction can be raised at any time during the trial, and that it did not appear affirmatively to the Court that the plaintiff had no legal right to commence the action, until the fact was disclosed by her testimony. The motion was denied and defendant excepted.

The defendant, George W. Tapley, was called on the part of the plaintiff and testified: "I know of the deed from myself and wife to Carll." The witness was asked the following question: "Was there any consideration for the deed to Carll?" Objected to by defendant that the same is irrelevant and incompetent. The objection was overruled and defendant excepted and the question was answered. Certain letters were handed to witness, and he testified that they were in the hand writing of defendant Walker. The plaintiff's counsel offered to read the letters in evidence, to which the defendant objected on the grounds: First—That the plaintiff had laid no foundation for their admission by showing that the letters had any allusion to the subject matter of the action. Second—That the letters themselves show that they relate only to a difficulty between Tapley or Johnson with Rathbone in relation to the occupancy of the land, and not to the subject matter of the action, and are irrelevant and incompetent. The objections were overruled and defendant excepted.

Question by plaintiff's counsel: "State what is the subject referred to in the letters?" Objected to as incompetent and objection overruled and defendant excepted. The witness answered: "They relate to the subject of the land in question and to Rathbone's buying it, and to this suit." The letters were read in evidence under objection by defendant.

After the testimony was closed the Court instructed the jury: "That to constitute duress which would avoid the deed, it is not necessary that the threats be of physical injury alone, but if the plaintiff, the wife of Tapley, was induced to execute the deed by the threats of Tapley her husband, that he would separate from her as her husband and not support her, it is duress, and would avoid the deed. The threats must be such as she might reasonably apprehend would be carried into execution, and the act must have been induced by the threats. It is not necessary that the threats be made at the time, or immediately before signing, if it was within such time, and the circumstances satisfy you that the threats or their influence properly continued and influenced the plaintiff," and such instruction was excepted to by defendant. The jury found a verdict in favor of the plaintiff upon all the issues. A motion for a new trial was made on the grounds: First—Errors in law occurring at the trial, and excepted to by the defendant Walker at the time. Second—Insufficiency of the evidence to justify said verdict, and that the same is against law. The motion was denied, and the defendant appeals to this Court.

S. SMITH for Appellant.

I.—The Court erred in denying the motion of the defendants to dismiss the action, on the ground that the plaintiff had no "status in court in her own name."

The objection is one going to the jurisdiction of the court and can be taken advantage of at any stage of the proceedings. A married woman cannot come into court except in the manner prescribed by statute. Our statute has prescribed the manner and our courts have given a construction to the same. *See Comp. Stat., p. 535, Sec. 30 of Chap. 60; Wolf vs. Banning et al., 3 Minn., R., 202; Irvine vs. Irvine, 5 Id., p. 61, 65; 24 How. P. R., 202.*

II.—The Court erred in admitting all that portion of the plaintiff's testimony objected to by the defendant.

The object of the testimony was two-fold: 1st—To show that

the deed was not properly executed: 2d—To show that it was obtained by duress.

It is incompetent for the plaintiff to impeach the execution of the deed, as her cause of action is based upon the proper execution of the deed as a conveyance.

It is incompetent for a witness to swear to his conclusions or intentions; the intent must be arrived at by the jury from evidence showing the acts of the parties and the facts and circumstances connected with the case. See *Greenl. Ev.*, Sec. 434; *Morehouse vs. Mathew*, 2 Com. R., 514; *Rich vs. Jackaway*, 18 Barb., 357; *Jefferson Ins. Co. vs. Cotheral*, 7 Wend., 72, 78. As to leading questions, see 1 *Greenl. Ev.*, Sec. 434; 2 *Phil. E. P.*, 401, 402, 403; *People vs. Mathew*, 4 Wend., 229, 247, 248.

III.—The objections to the introduction of the letters of Walker to Tapley, and the testimony of G. W. Tapley as to the subject matter of said letters, were well taken. They were written after the commencement of the action, and in reference to a matter which had nothing to do with this case. The question whether Walker had notice or not, was immaterial, as it was admitted by the pleadings that there was no new consideration for the deed from Carll to Walker, but that it was given for the payment of an old debt. The natural tendency of the testimony was to prejudice the jury against the defendant, and being improperly admitted, is a good cause for granting a new trial.

IV.—The verdict was against law and evidence, and a new trial for that cause should be granted.

The prayer of the complaint is that the deeds be set aside and declared void on the ground that they were obtained by fraud and duress, and those were the only two material issues tried and submitted by the plaintiff to the jury.

There is no evidence in the case showing that the plaintiff at the time she executed the deed to Carll, was under such compulsion of her husband as would amount to duress—such as would avoid a deed. All the testimony on this point is from the plaintiff, and defendant Tapley.

Threats of battery or fear of the same does not amount to duress.
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ress, although ever so well founded. See *Willard's Eq.*, p. 208; 1 *Par. Con.*, p. 319; *Willard's Eq.*, 208.

There is no evidence in the case to show that there was any fraud practiced on the part of the defendant Tapley, towards his wife, upon which she relied, and which induced her to execute the Carll deed.

Fraud is a false representation within the knowledge of the party making it, reasonably relied upon by the other party, and constituting a material inducement to his act or contract. If it is not a material inducement to the act, courts of equity will not relieve. See *Willard's Eq.*, 148, 149.

V.—The Court erred in instructing the jury “that to constitute duress which would avoid the deed, it is not necessary that the threats be of physical injury alone, but threats of a separation from her, and that he would not support her, would amount to duress which would avoid the deed.” 1 *Par. Con.*, 319.

M. LAMPREY for Respondent.

I.—The evidence objected to by the defendant's counsel relates to the circumstances under which the deed therein mentioned was obtained from the plaintiff by the defendant, and, we think, it was clearly competent. 2 *Phil. Ev., Cov. & Hill's notes*, 686, 687, 690, and notes.

II.—When an action is brought by a married woman concerning her separate property she may sue alone, and when the action is between herself and her husband she may sue and be sued alone. *Comp. Stat.*, page 535, Sec. 30.

The second ground of demurrer prescribed by the statute is “That the plaintiff has no legal capacity to sue.” *Comp. Stat.*, page 540, Sec. 61. Section 61 of the same page provides that “When any of the matters enumerated in section 61, do not appear on the face of the complaint, the objection may be taken by answer. And section 65 provides that if no objection be taken either by demurrer or answer, the defendant must be deemed to have waived the same, excepting only the objection to the juris-

diction of the Court, and the objection that the complaint does not state facts sufficient to constitute a cause of action."

The objection of "no legal capacity to sue," therefore, cannot be taken advantage of on motion, but was wholly waived in this cause.

It is observed that the statute of New York respecting suits by married women differs from ours. 2 *Kernan*, 580; 3 *Kernan*, 322, and cases cited; 14 *How. Pr. R.*, 456; 3 *Abbott's Pr. R.*, 119; 6 *Barb.*, 541; 11 *How. P. R.*, 216; 12 *Id.*, 547; 12 *Barb.*, 9; 2 *Duer*, 160; 8 *How.*, 250.

III.—The title of the cause is no part of the complaint proper. It is not an allegation to be put in issue any more than the name of a party, or of the county where the action is brought.

IV.—The evidence to show a want of consideration in the deed to Carll, and the letters from Walker to Tapley, were properly admitted as bearing upon the questions of fraud and duress. 1 *Greenl. Ev.*, 284.

V.—The jury found that the deed to Carll was obtained by fraud, and that the defendant Walker had notice of it. This alone would avoid it.

VI.—To constitute duress *per minas*, it is not essential that the party be threatened with loss of life or limb, or with mayhem; fear of imprisonment is enough.

Threats by the husband that he would leave his young wife, and would not support her, but would abandon her to poverty and want, without a home or shelter, constituted duress the most summary and effective. In the application of an analogous principle, courts of equity watch with extreme jealousy, all contracts made with persons, who are in a condition to exercise a controlling influence over the will or conduct of others. 5 *Hill*, 158; 1 *Pars. Con.*, 321; *Willard's Equity*, 208; 6 *Mass.*, 506; 2 *Wend.*, 243; 15 *Johns.*, 256; 1 *Story's Equity*, 236; 26 *N. Y.*, 9; 3 *Cowen*, 537; 2 *Selden*, 272; 11 *Paige*, 538; 5 *Denio*, 640; 11 *Paige*, 467.

VII.—The verdict in this case is supported by evidence plenary and conclusive, and the motion for a new trial was properly de-

nied. 7 *Minn.*, 414; *Id.*, 511; 8 *Minn.*, 70; *Id.*, 218; 5 *Minn.*, 339; 4 *Minn.*, 148.

By the Court—BERRY, J.—It appearing from the testimony of the respondent, who was plaintiff below, that she was a married woman and wife of one of the defendants, the counsel for the appellant moved to dismiss the action on the ground that the Court had no jurisdiction of the person of the plaintiff, insisting that the objection could be taken by motion at any stage of the trial.

This objection went to the legal capacity of the plaintiff to sue, and not having been taken by *answer* or *demurrer*, was waived. *Pub. Stat.*, 540, *Sec.* 69. The motion was therefore properly overruled. Several interrogations propounded to the plaintiff upon the witness stand were objected to as leading. Even if the interrogatories were leading in form, there is no inflexible rule by which they can be excluded.

The judge who presides at the trial has far better opportunities of determining whether a question is objectionable as improperly suggesting an answer to the witness which will be but an echo of the question, than this Court possesses, and unless it is quite apparent (as it is not in this case), that some gross injustice resulted from the mode of examination allowed, we are not inclined to criticise or review it. 1 *Greenl. Ev.*, *Sec.* 435. Several inquiries were addressed to the respondent by her counsel which were objected to as incompetent or irrelevant or both. They were all directed to the circumstances under which the deed from the respondent to Carll was executed or delivered, and as we think all had a tendency to show that the execution and delivery were not the free and voluntary acts of the respondent.

Ordinarily the proper course would be to ask the witness to state the circumstances attending the giving of a deed, but for reasons which appear to have controlled the discretion of the Court, counsel were allowed to call the attention of the witness to particular matters which went to give character to the transaction and by interrogatories which were leading in form.

We can conceive of no reason why they were not competent. Certainly it would have been proper to ask the witness in a general way, "What induced you to execute the instrument?" and we apprehend that the interrogatories put to this witness were to the same effect.

It is to be remembered that in this action the respondent appeals to the equitable powers of the Court, and it is not a case in which the defendant Walker comes into Court with clean hands, setting up the innocency and *bona fides* of his purchase; but a case in which he has not only taken a conveyance in payment of a precedent debt, but in which as the evidence tends to show and the jury find, he had full knowledge at the time he took his title of the circumstances under which his grantor acquired title, and by those circumstances he is affected to the same extent as if he stood in Tapley's shoes, and had been an active party in fact to the original transaction. If it should be held that by the *fact* of an acknowledgment before a proper officer, a married woman may be *estopped* from denying the voluntary execution of her deed to the prejudice of an innocent party, the doctrine could have no application here. Another question was raised upon the trial below as to the admissibility of certain letters written by the defendant Walker to his co-defendant George W. Tapley. Whether the inquiries made of the witness as to what those letters related to, and to what letters they were in reply were proper or not, is immaterial. The letters themselves taken together and in connection with the facts which had already appeared from the pleadings and evidence, sufficiently showed that they related to the land in question and the transactions involved in this suit. We think they were rightly received. In order to affect Walker with the equities of the respondent against Carl and her husband, she had a right to rely upon the fact that Walker took the land in payment for a precedent debt, or to show that he took it with a full knowledge of all the circumstances or both, and if the fact that the answer admitted that the land was taken for a precedent debt, might dispense with the necessity of going farther and proving knowledge, we are unable to see how injustice was done by al-

lowing such knowledge to be proved, and that too by written admissions of the defendant Walker. We think the letters had a tendency to establish this knowledge, to show bad faith on the part of Walker, and to render the whole business from the beginning more than suspicious.

There were other objections made to the admission of testimony which it is not necessary to notice further than to say that they are not well taken, as they seem to be waived by the omission to rely upon them in the points or arguments of the appellant's counsel.

The Court instructed the jury among other things: "That to constitute duress which would avoid the deed, it is not necessary that the threats be of physical injury alone, but if the plaintiff, the wife of Tapley, was induced to execute the deed by the threats of Tapley her husband, that he would separate from her as her husband and not support her, it is duress, and would avoid the deed. The threats must be such as she might reasonably apprehend would be carried into execution, and the act must have been induced by the threats. It is not necessary that the threats be made at the time, or immediately before signing, if it was within such time, and the circumstances satisfy you that the threats or its influence properly continued and influenced the plaintiff."

To this instruction exception was taken, but not well taken. Greenleaf in the 2d volume of his work on Evidence, section 301, says that "By duress in its more extended sense is meant that degree of severity either threatened and impending or actually inflicted, which is sufficient to overcome the mind and will of a person of ordinary firmness." And again, that duress *per minas* is restricted by the common law to fear of "remediless harm to the person." There is no doubt that the common law sense of the word "duress," has been somewhat enlarged in the progress of civilization. See *Toshay vs. Ferguson*, 5 Denio, 157. In that case Mr. Justice Bronson holding that the fear of threatened illegal imprisonment will constitute duress *per minas*, adds: "I entertain no doubt that a contract procured by threats and the fear of

battery or the destruction of property, may be avoided on the ground of duress." And he gives the reason: "There is nothing but the form of a contract in such a case without the substance. It wants the voluntary assent of the party to be bound by it."

And Greenleaf in the same section from which we have already quoted, after saying that "a fear of mere battery or of destruction of property is not technically duress," adds: "but facts of this kind it is conceived are admissible in evidence to make out a defence of *fraud* and *extortion* in obtaining the instrument." It seems that the rule has been some times laid down that when the threat is of an injury for which full compensation can be obtained at law it would not amount to duress, as for instance a threat of injury to property or of a slight injury to person.

But in 1 *Par. on Con. 5th Ed.*, 395, it is said "these distinctions would not now probably have a controlling power in this country, but where the threat, whether of mischief to the person or property, or to the good name, was of sufficient importance to destroy the threatened party's freedom, the law would not enforce any contract which he might be induced by such means to make."

The books abound with cases in which conveyances and other instruments have been set aside because procured by the exercise of undue influence upon the party executing them, without the infliction or threat of any physical injury or mischief. 1 *Eq. Lea. Ca.*, 94 *et seq.* And in the general sense of the term undue influence would seem to be a species of duress, or if this be not quite accurate, the two would at last seem to run together so that the precise line where one begins and the other stops is not easily definable. But it is to be remarked that in all these cases where contracts are overthrown because entered into under duress by actual injury or threatened injury, or under undue influence, the principle upon which the courts rest is that such contracts lack that voluntary assent which is of the essence of all contracts, and without which, as Story says, the party "has no free will but stands *in vinculis*." 1 *St. Eq. Jur.*, Sec. 239. Whether there was evidence from which the jury in this case were warranted on finding a technical fraud, it is unnecessary to determine. In one

sense duress is fraudulent; that is to say, the obtaining of a contract under duress is not a fair and honest transaction. But the jury found that the deed to Carll was obtained by both fraud and duress, and as either would furnish sufficient cause for setting aside the conveyance, if either was warranted by the facts developed on the trial, it is unimportant whether the other finding was warranted or not. We think the facts bring the case within the principle and meaning of the law of duress. Not to recapitulate the testimony in detail, there was in this case evidence that the land in question was the separate property of the respondent, given to her by her father; that after much importunity, abusive treatment, and threats of various kinds, she was induced to make a conveyance of it. That among other things he threatened to abandon her, which she thought "would be a family scandal." That it was only on account of his threats and abusive treatment and to keep peace, that she executed the conveyance. Here was clearly a threatened injury to her good name, which is duress within the rule laid down by Parsons. And looking at the reason of things, if, as is well settled, (*see case cited from 5th Denio*), a threat of injury to goods and other property, a threat of a battery or of illegal imprisonment, are held sufficient to constitute duress and to avoid a contract, on the ground that they take away freedom of action, and are calculated to overcome the mind of a person of ordinary firmness, when believed in, it would seem too clear for argument that equal effect ought to be given to a threat by a husband to abandon his wife and turn her out upon the world to shift for herself in the anomalous condition of a wife without a husband. If the degree of injury apprehended, and its almost remediless nature, are to be taken into account, (and not to do so would be irrational,) then certainly in these respects the abandonment of a wife by her husband is far in excess of a battery to the person, or a trespass upon the goods, and stands upon stronger ground. We think the instruction was rightly given, and that there was evidence in the case sufficient to warrant the jury in finding for the plaintiff.

The order denying the motion to set aside the verdict and for a new trial is affirmed.

ANALYTICAL INDEX.

ACTION.

1. In an action upon a recognizance it is not necessary to allege that the penalty has not been paid. *State v. Grant*, 39.

2. The lien conferred by the 8th section of the act entitled "An act in relation to the redemption of lands sold for taxes, and relating to taxes and tax sales," approved March 11, 1862, cannot be adjudicated in an action under sec. 1, chap. 64 of the Comp. Stat.; but the purchaser at the tax sale must resort to a separate action to enforce such lien. *Bidwell v. Webb*, 59.

3. In an action for damages for a simple assault and battery, it is not necessary to charge in terms that it was "willful" or "malicious," to entitle the plaintiff to maintain his action. *Andrews v. Stone*, 72.

4. In such an action when no special damages are laid, the plaintiff is not confined to the recovery of merely nominal damages, but may recover such general damages as he may prove to have resulted from the injury. *Id.*

5. An undertaking (given on appeal from an order,) by which the parties executing the same agree in case a certain judgment be affirmed in whole or in part to pay such judgment, or the part as to which it is affirmed, will not support an action against such parties where it appears that as a matter of fact no such judgment was ever rendered. *Galloway v. Yates et al.*, 75.

6. The refusal to pay a judgment entered in accordance with the affirmance vol. x.—59

of the order appealed from in such case, is not a breach of the undertaking. *Id.*

7. The fact that an action is not commenced in the proper county is not an error that deprives the Court of jurisdiction, or that can be reached by demurrer. *Nininger v. Commissioners Curver Co.*, 133.

8. In an action for damages resulting from the upsetting of the plaintiff's carriage, if the complaint fails to charge, either directly or by implication, that the defendant was the cause of the upset, judgment will be arrested after verdict on motion. *Lee v. Emery et al.*, 127.

9. The defendant having mortgaged to the plaintiff certain land, the plaintiff foreclosed the mortgage. The plaintiff afterward, supposing the mortgage sale to be void or irregular, commenced an action to have it set aside and a resale ordered. The defendant appeared in the action and prayed that the sale might not be set aside, and offered to quit-claim to plaintiff his interest in the premises. On his filing said quit-claim deed, the Court refused to set aside the deed. *Held*—that said sale having been confirmed at the instance of defendant, he can not now be heard to deny its validity, and that the plaintiff may maintain an action for the balance due on the notes secured by said mortgage. *Blake v. McKusick*, 251.

10. Plaintiffs and defendant were owners as tenants in common of a judgment. By the terms of the assignment either of the assignees were expressly authorized to collect the judgment to their joint use. The defendant, one of the assignees, proceeded to collect the judgment and at the sale under the execution bid off the property in his own name, and in due time the title in him became perfect. *Held*—1. That to the extent of the purchase the defendant acted within the scope of the power conferred by the assignment. 2. That in the absence of any circumstances showing fraud or bad faith, or that the action of the defendant was not for the benefit of the assignees, or that the purchase was not intended to be in pursuance of the power, the defendant holds the lands in trust for the plaintiff to the extent of her interest in the judgment; and 3. That the defendant is not liable as for money had and received. *Holmes v. Campbell*, 491.

See PLEADINGS AND PRACTICE, 18. SCHOOLS AND SCHOOL DISTRICTS, 3, 4, 5.
6. MALICIOUS PROSECUTION, 2.

AMENDMENT.

SEE PLEADINGS AND PRACTICE, 29.

ANSWER.

1. Where a contract for the performance of certain services at an agreed price is admitted to be in full force, an allegation in an answer that services performed by the defendant under the contract were of a specified value is immaterial and irrelevant. *Starbuck v. Dunklee*, 168.

2. When the answer admits the receiving of a large quantity of wood for transportation, the defendant is not permitted to deny any knowledge whether the quantity was as alleged in the complaint or otherwise unless he shows some excuse for his want of knowledge upon the subject. *Id.*

3. A denial of all the allegations of a complaint except what the Court may construe to be admitted in the foregoing part of the answer, is bad. *Id.*

See DEMURRER, 4.

APPEAL.

1. An order of the District Court setting aside an order made by a Court Commissioner in a habeas corpus proceeding discharging the relator, is an appealable order. *State ex rel. v. Hill*, 63.

2. An appeal lies from an order striking out portions of an answer. *Starbuck v. Dunklee*, 168.

3. When the case is not one of variance, but of failure of proof, under sec. 92, p. 544, *Pub. Stat.*, a motion for amendment is addressed to the discretion of the Court under sec. 94, and no appeal lies from an order denying such amendment unless a gross abuse of discretion is clearly established. *White et al. v. Culver*, 192.

4. An appeal does not lie from the assessment of damages by the board of county commissioners, made in pursuance of the provisions of Chap. 68, *Sess. Laws* 1862, providing for the location, change and vacation of highways. *Kennig v. Winona County*, 238.

5. An appeal does not lie from a mere refusal of the District Court to entertain a motion. *Mayall et al. v. Burke et al.*, 285.

6. On an appeal from a Justice of the Peace, none of the appeal papers are subject to a stamp duty. *Dorman v. Bayley*, 383.

See JUSTICE OF THE PEACE, 1, 2, 3. . PLEADINGS AND PRACTICE, 45, 46.

APPEARANCE.

1. When a foreign corporation demurs to a complaint in the District Court, it appears and thereby confers upon the Court jurisdiction over it. *Reynolds v. La Crosse & Minn. Packet Co.*, 178.

ASSIGNMENT.

1. Plaintiffs and defendant were owners as tenants in common of a judgment. By the terms of the assignment either of the assignees were expressly authorized to collect the judgment to their joint use. The defendant, one of the assignees, proceeded to collect the judgment, and at the sale under the execution bid off the property in his own name, and in due time the title in him became perfect. *Held*—1. That to the extent of the purchase the defendant acted within the

scope of the power conferred by the assignment. 2. That in the absence of any circumstances showing fraud or bad faith, or that the action of the defendant was not for the benefit of the assignees, or that the purchase was not intended to be in pursuance of the power, the defendant holds the lands in trust for the plaintiff to the extent of her interest in the judgment; and 3. That the defendant is not liable as for money had and received. *Holmes v. Campbell*, 401.

ASSAULT AND BATTERY.

1. In an action for damages for a simple assault and battery, it is not necessary to charge in terms that it was "willful" or "malicious," to entitle the plaintiff to maintain his action. *Andrews v. Stone*, 72.

2. In such an action when no special damages are laid, the plaintiff is not confined to the recovery of merely nominal damages, but may recover such general damages as he may prove to have resulted from the injury. *Id.*

See CRIMINAL LAW, 12, 13, 14, 15, 16.

BANK.

1. When a note is left with a bank for collection, it is the duty of the bank to make demand of payment, and take all necessary and legal steps to fix the liability and hold the parties thereon. *Bidwell et al. v. Madison*, 13.

2. An officer of a bank whose duty it is to take charge of all notes left for collection is liable to the bank for any neglect to discharge such duty. *Id.*

BAILMENT.

1. A complaint which alleges the delivery of goods by the owner to another, and an acceptance by such other, to be carried from one place to another without reward; the loss of such goods by the bailee, and that the loss was occasioned by the gross negligence of the bailee, stating the value of the goods and the damage to the bailor, states a cause of action. *McCauley v. Davidson et al.*, 418.

2. Negligence is a question of fact, or mixed fact and law, and in pleading it is only necessary to aver negligence generally, not the specific facts constituting negligence. *Id.*

3. All bailments, whether with or without compensation to the bailee, are contracts founded upon a sufficient consideration. *Id.*

BOND.

See RECOGNIZANCE.

CASES OVERRULED, DOUBTED OR EXPLAINED.

1. *Chaska County v. Carver County*, (6 Minn., 204,) commented on and followed. *Nininger v. Commissioners Carver Co.*, 133.

2. *Morrison et al. v. Lovejoy et al.*, (6 Minn., 319,) commented on and explained. *Lovejoy et al. v. Morrison et al.*, 186.
3. *Huywood v. Judd*, (4 Minn., 483,) and *Goenen v. Schroeder*, (8 Minn., 387.) followed. *Carroll v. Rossiter*, 174.
4. *Babcock et al. v. Sanborn et al.*, (3 Minn., 141,) overruled in part. *Reynolds v. La Crosse and Minnesota Packet Co.*, 178.
5. *Pease, Chalfant, & Co. v. Rush, Pratt & Co.*, (2 Minn., 107,) commented upon and explained. *Van Eman v. Stanchfield et al.*, 255.
6. The rule as to the requisites of affidavits for publication of summons, laid down in *Mackubin & Edgerton v. Smith*, 5 Minn., 267, applied and followed. *Harrington v. Loomis et al.*, 366.
7. *Broome v. Galena, D., D. & Minn. Packet Co.*, 9 Minn., 239, commented on and followed. *Sullivan v. La Crosse & Minn. Packet Co.*, 386.
8. The rule heretofore laid down that this Court will not review errors in the taxation of costs, unless application to correct the same is made to the District Court in the first instance, followed. *Hurd v. Simonson*, 423.
9. The case of *Stratton v. Allen & Chase*, (7 Minn., 502,) commented upon and explained. *Id.*
10. The decision in *Dodge vs. Hollinshead*, 6 Minn., 25, followed. *Edgerton et al. v. Jones et al.*, 427.

CERTIORARI.

1. Under the United States Internal Revenue Law of 1862, a writ of certiorari was not subject to a stamp duty. *Pierce vs. Huddleston*, 131.
2. In an application for a certiorari to a Justice's Court, the presentation of the affidavit required by *sec. 124, chap. 59, Comp. Stat.*, within twenty days after the rendition of the judgment, is an essential requisite to the authority of the Judge to allow the writ of certiorari. *Cunningham v. La Crosse & St. Paul Packet Co.*, 299.
3. The omission to state in the affidavit that the application is made in good faith and not for the purpose of delay, renders the affidavit substantially defective, and the Judge has no authority to allow the writ; nor is the affidavit amendable. *Ibid.*

See PLEADINGS AND PRACTICE, 1.

CLAIM—DELIVERY.

See REPLEVIN.

COMPLAINT.

1. The complaint avers that S. B. O. made and delivered to the firm of J. & A. J. C. his certain promissory note dated Aug. 13, 1857, payable to their order four months after date, for one thousand dollars; that on the 21st of December,

1857, the payees for a valuable consideration transferred and delivered the same to one A. F., who was the owner, and held the same on the 18th of March, 1858; that on said 18th March, 1858, the defendants entered into a contract with S. B. O., whereby the latter sold to the defendants certain logs, and the defendants agreed to make payment as follows, viz: first to assume and take up the note held by A. F., and the interest thereon, to be paid on the 1st of December, 1858. This contract was signed by the parties and witnessed by A. F. That on the said 18th day of March, 1858, in consideration of said agreement, and to carry out the same, the said defendants made and delivered to said A. F. an agreement in writing, of which the following is a copy: "Whereas, S. B. O. has this day, March 18, 1858, sold and entered into a contract with S. & B. and J. D., [the defendants], for all his logs from St. Paul to head of Lake Pepin, the said S. & B. and J. D. have agreed to assume and pay a certain note now held by A. F., given to A. & A. J. C. by S. B. O., for \$1000; and we have agreed to pay the said note to A. F. on the 1st day of December, 1858, without interest after this date (March 18, '58) to December 1st, 1858; and if not paid at maturity, we agree to pay the said A. F. one per cent. per month until paid." That the note mentioned in the agreements is the note first mentioned in the complaint; that after the time mentioned in the contracts for the payment of the note, Dec. 1, 1858, A. F. demanded payment of the defendants; that no part of it has been paid; that after said demand and before the commencement of this action, A. F. sold and delivered the note to this plaintiff, and sold, assigned and transferred to the plaintiff all his interest in and to said contracts, and all his claim and demand arising out of the same against said defendants; that the plaintiff is now the owner and holder of the note. *Held*—that the complaint states facts which constitute a cause of action; that the two contracts mentioned in the complaint were concurrent in point of time and constitute but one transaction; that the sale by S. B. O. was the consideration of both agreements, and the second agreement contains a promise to A. F. to pay him the note; that there is, therefore, a privity of contract between the defendants and A. F., founded upon the consideration from S. B. O. to the defendants; that upon such a state of facts A. F. or his assignee may maintain an action. *Van Eman v. Stanchfield et al.*, 255.

2. When a complaint sets up a contract and alleges a breach thereof, a demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action, is not well taken, since the plaintiff is at least entitled to nominal damages. *Cowley v. Davidson*, 392.

3. S. S. Eaton, defendant, deposited in the First National Bank money in name of "S. S. Eaton, Agent." *Held*—That this was not conclusive evidence that the money was the property of said Eaton, and the officers of the Bank having denied any indebtedness to him, or the possession or control of any money or effects belonging to him, the plaintiffs could not proceed farther against the

garnishee without filing a supplemental complaint as provided in *chapter 70 of the Laws of 1860*. *Ingersoll et al. v. First National Bank, Garnishee, &c.* 396.

4. A complaint which alleges the delivery of goods by the owner to another, and an acceptance by such other, to be carried from one place to another without reward; the loss of such goods by the bailee, and that the loss was occasioned by the gross negligence of the bailee, stating the value of the goods and the damage to the bailor, states a cause of action. *McCawley v. Davidson et al.*, 418.

5. Negligence is a question of fact, or mixed fact and law, and in pleading it is only necessary to aver negligence generally, not the specific facts constituting negligence. *Id.*

6. In an action to recover possession of personal property *wrongfully detained*, and for damages, the want of an allegation of demand and refusal is cured by a verdict for the plaintiff, if the complaint avers generally that the defendant "wrongfully detains," &c. *Hurd v. Simonton*, 423.

7. The fact that a complaint does not ask for the proper relief, or asks for inconsistent relief, is not ground of demurrer. *Connor v. Board of Education, St. Anthony*, 439.

See PLEADINGS AND PRACTICE, 28. RAILROADS, 7, 11, 12, 13, 14. MALICIOUS PROSECUTION, 2, 3.

CONSIDERATION.

See CONVEYANCE, 2.

CONSTITUTION.

1. *Chap. 104 of the Special Laws of 1858, p. 303*, is not repugnant to *sec. 2 of article 10 of the Constitution of this State*. *McRoberts v. Washburne et al.*, 23.

2. A grant of a ferry franchise by the Legislature is a contract within the meaning of that provision of the Constitution prohibiting the passage of laws impairing the obligation of contracts. *Id.*

3. *Chap. 63 of the Special Laws of 1862, p. 324*, is unconstitutional. *Id.*

4. The statute conferring power upon any Judge of the Supreme Court to allow writs of habeas corpus, is not in conflict with the State Constitution. *State v. Grant*, 39.

5. Under our constitution and laws a Court Commissioner has jurisdiction to grant a writ of habeas corpus returnable before himself, and proceed to the hearing and determination thereof, where the prisoner is detained in the county in which he resides; and the Court Commissioner of one county has like jurisdiction in cases where the prisoner is detained in an adjoining county, if it properly appears that there is no officer in such adjoining county authorized to grant the writ, or if there be one, that he is absent or for any cause be incapable of acting, or has refused to grant the writ. *State ex rel. v. Hill*, 63.

6. *Section 15, Chap. 4, Compiled Statutes*, which provides that "either House may, by resolution, request the opinion of the Supreme Court, or any one or more of the Judges thereof, upon a given subject, and it shall be the duty of such Court or Judges when so requested, respectively, to give such opinion in writing," is unconstitutional and void, and therefore imposes no duty on the Court. *In the Matter of the Application of the Senate*, 78.

7. *Sec. 1, Art. 11 of the Constitution* requires only (for the adoption of such law) a majority of the electors present and voting at such election. [Berry, J., dissenting.] *Taylor v. Taylor et al.*, 107.

8. When the literal interpretation of an instrument involves any absurdity, contradiction, injustice or extreme hardship, the Courts may deviate a little from the received sense and literal meaning of the words, and interpret the instrument in accordance with what may appear to have been the intention and meaning of its framers, and the real intention, when accurately ascertained, must in all cases prevail over the literal sense of the terms. *Id.*

9. The meaning of particular words in statutes, as well as other instruments, is to be found not so much in the strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used and the object that is intended to be attained. *Id.*

10. The constitutional debates can not properly be resorted to as aids in the construction of the constitution. *Id.*

11. Under the State Constitution the District Court is a court of general jurisdiction, and has original jurisdiction in civil actions, although the amount in controversy may be less than one hundred dollars. *Thayer v. Cole*, 215.

CONSTRUCTION OF STATUTES.

1. *Chap. 104 of the Special Laws of 1858, page 303*, is not repugnant to *Sec. 2 of Art. 10 of the Constitution* of this State. Section 2 of said chapter operated as a repeal of the first proviso of *Sec. 7 of Chap. 71, page 269, of the Session Laws of 1857*. *McRoberts v. Washburne et al.*, 23.

2. *Chap. 63 of the Special Laws of 1862, p. 324*, is unconstitutional. *Id.*

3. The statute conferring power upon any Judge of the Supreme Court to allow writs of habeas corpus, is not in conflict with the State Constitution. *State v. Grant*, 39.

4. The only matters embraced within the purview of *Sec. 1, Chap. 64 of the Comp. Stat.*, are claims to *estates or interests* in real property adverse to the occupant. *Bidwell v. Webb*, 59.

5. Under our constitution and laws a Court Commissioner has jurisdiction to grant a writ of habeas corpus returnable before himself, and proceed to the hearing and determination thereof, where the prisoner is detained in the county in which he resides; and the Court Commissioner of one county has like juris-

diction in cases where the prisoner is detained in an adjoining county, if it properly appears that there is no officer in such adjoining county authorized to grant the writ, or if there be one, that he is absent or for any cause be incapable of acting, or has refused to grant the writ. *State ex rel. v. Hill*, 63.

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8. The meaning of particular words in statutes, as well as other instruments, is to be found not so much in the strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used and the object that is intended to be attained. *Id.*

9. Without reference to the amendment of 1860, our statute exempts as a homestead a quantity of land not exceeding one lot in any incorporated city, and no restriction is placed upon the uses of any part of it, provided it is the dwelling place of the claimant. *Kelly v. Baker et al.*, 154.

10. Sec. 17, page 627, *Pub. Stat.*, so far as it requires eight days' notice of a motion, does not have reference to orders to show cause. *Goodrich et al. v. Hopkins et al.*, 162.

11. When the case is not one of variance, but of failure of proof, under sec. 92, p. 544, *Pub. Stat.*, a motion for amendment is addressed to the discretion of the Court under sec. 94, and no appeal lies from an order denying such amendment unless a gross abuse of discretion is clearly established. *White et al. v. Culver*, 192.

12. Subdiv. 7, sec. 87, ch. 60, page 543, *Pub. Stat.* is repealed by Sec. 4, Ch. 11, *Col. St. of 1853*. *Fish v. Berkey et al.*, 199.

13. Sec. 150, Chap. 59, *Comp. Stat.*, makes the payment of the costs and the fee for the return essential conditions to the jurisdiction of a justice of the peace to allow an appeal in a civil action. *Trigg v. Larson*, 220.

14. Action of plaintiff against defendant under Chap. 76 of the *Comp. Stat.*; *Held*—that the remedy given by this chapter is a "common law remedy," and is therefore saved to suitors by the judiciary act of the United States, passed in vol. x.—60

1789. That the District Courts of this State have jurisdiction in this class of cases. *Reynolds v. Steamboat Favorite*, 242. *Morin v. Steamboat F. Sigel*, 250.

15. The plaintiff in the action is not entitled to a second trial under *Sec. 5, Chap. 64*, page 595, *Pub. Stat.* *Hovos v. Gillett*, 397.

See SCHOOLS AND SCHOOL DISTRICTS, 7, 8. COUNTY COMMISSIONERS, 1. RAILROADS, 3, 4, 5, 6.

CONSTRUCTION OF CONTRACTS.

1. A written instrument in which the obligors undertake "to execute and deliver to each and every lot owner who may have title thereto from Joseph Briesson and wife, or from either of them in any portions of lot known as lot four, section 29, town 111, north of range 10 west, State of Minnesota, a good and sufficient deed in fee simple with all proper covenants of warranty, whenever hereafter a patent shall be issued for said lot 4 to said Pauline Monette," &c., is void for uncertainty as to the property to be conveyed by the deed. *Sharpe v. Rogers*, 207.

See CONSTRUCTION OF STATUTES, 7, 8. CONVEYANCE, 2. COMPLAINT, 1. SCHOOL AND SCHOOL DISTRICTS, 8.

CONTESTED ELECTION.

See ELECTION LAW, 4.

CONTRACT.

1. A grant of a ferry franchise by the Legislature is a contract within the meaning of that provision of the Constitution prohibiting the passage of laws impairing the obligation of contracts. *McRoberts v. Washburne*, 23.

2. In the absence of fraud or mistake, parol evidence is inadmissible at law or in equity to vary a written contract. *Schurmeier v. Johnson et al.*, 319.

See BAILMENTS, 3.

CONVEYANCE.

1. S. executed a quit-claim deed running to A. of certain land on the Half-Breed Reservation. At the time of executing such deed the title of the land was in the United States, subject to a usufruct by the half breeds of the Sioux nation. The deed contained a covenant by which S. bound himself, when he should acquire title from the United States, to make such further or other conveyance of the premises to A., his heirs or assigns, as should be valid and effectual to convey the premises, &c. Subsequently S. acquired the title from C., who acquired it from the United States. Afterwards by a full covenant warranty deed S. conveyed to H. all his "right, title, interest, estate, property, possession, claim or demand whatever to said premises." *Held*—That the quit-claim deed and covenant were not illegal; that when S. acquired the title he held it in trust for the performance of his covenant, and that H. took it subject to the same trust. *Hope v. Stone et al.*, 141.

2. In 1858 the defendant conveyed to the plaintiff, Maria B. Dayton, by deed, with covenants of seizin and warranty, the southwest quarter of section 21, town 29, range 23. The deed (in which the consideration was stated to be \$8000) contained the following recital or stipulation: "It being expressly understood between the parties hereto that the consideration expressed above, to-wit, \$8000, is the estimated value of certain lots in Lyman Dayton's addition to St. Paul, in exchange for which lots the above described premises are hereby conveyed as aforesaid." *Held*—that this is a mere recital of the consideration, and therefore susceptible of explanation; that the question to be tried in the case is what the value was as a matter of fact, and what the defendant thus admitted in the deed may be evidence, but it is not conclusive of the fact. *Dayton et al. v. Warren*, 233.

3. The German Land Association, being a mere voluntary association of persons unincorporated, has no legal capacity to take or hold real property; nor can such Association be the beneficiary of a trust. A deed, therefore, to A, B & C, in trust for such Association, is void. *German Land Association v. Schotler*, 331.

4. Where a married woman objects to signing a deed of real property and is thereupon addressed by her husband in harsh, threatening and abusive language (though not in the presence of the acknowledging officer) and immediately thereafter in the presence of her husband she acknowledges the same to be her voluntary act, &c., the presence of the husband is a coercive presence; the acknowledgment is not taken "separately apart" from her husband in the spirit and meaning of the statute, and the instrument is ineffectual to pass her interest in the land. *Edgerton et al. v. Jones et al.*, 427.

5. Threats by a husband to separate from his wife, accompanied by general abusive treatment, will constitute duress so as to avoid a deed executed by her under a reasonable apprehension that they will be carried into effect. *Tupley v. Tupley et al.*, 448.

COSTS.

1. The rule heretofore laid down that this Court will not review errors in the taxation of costs, unless application to correct the same is made to the District Court in the first instance, followed. *Hurd v. Simonson*, 423.

CORPORATION.

1. When a foreign corporation demurs to a complaint in the District Court, it appears and thereby confers upon the Court jurisdiction over it. *Reynolds v. La Crosse & Minn. Packet Co.*, 178.

2. A summons can only be served on a foreign corporation by publication. *Sullivan v. La Crosse & Minn. Packet Co.*, 386.

3. Service on the President or managing agent of such corporation within this

State is a nullity, and confers no jurisdiction on the Court, and in such case the defendant may maintain a writ of error to reverse the judgment. *Id.*

COUNTER-CLAIM.

1. When a note is left in a bank for collection, and its officers neglect to protest such note so as to fix the liability of endorsers, and the owner of the note sustains damage thereby, such damage is a proper counter-claim in an action brought by the bank upon a note made by such owner. *Bidwell et al. v. Madison*, 13.

COUNTIES AND TOWNSHIPS.

1. Sec. 1, Art. 11 of the Constitution requires only (for the adoption of such law) a majority of the electors present and voting at such election. [Berry, J., dissenting.] *Taylor v. Taylor et al.*, 107.

COUNTY AUDITOR.

1. A County Auditor may act by deputy in the canvass of votes. *Crowell v. Lambert*, 369.

COUNTY COMMISSIONERS.

1. An appeal does not lie from the assessment of damages by the board of county commissioners, made in pursuance of the provisions of Chap. 68, *Secs. Lws* 1862, providing for the location, change and vacation of highways. *Karny v. Winona County*, 238.

COUNTY TREASURER.

1. When lands sold for taxes under chap. 4 of *Lws* of 1862, have been redeemed, the County Treasurer is by law required to pay over to the purchaser the full amount for which such property sold, with interest on such amount from the day of sale to the time of redemption, without making any deduction therefrom for fees. *Stuart v. Walker*, 296.

COURT COMMISSIONER.

1. Under our constitution and laws a Court Commissioner has jurisdiction to grant a writ of habeas corpus returnable before himself, and proceed to the hearing and determination thereof, where the prisoner is detained in the county in which he resides; and the Court Commissioner of one county has like jurisdiction in cases where the prisoner is detained in an adjoining county, if it properly appears that there is no officer in such adjoining county authorized to grant the writ, or if there be one, that he is absent or for any cause be incapable of acting, or has refused to grant the writ. *State ex rel. v. Hill*, 63.

COVENANT.

See CONVEYANCE, 1.

CRIMINAL LAW.

1. It appearing that the defendant deliberately and intentionally shot the deceased, the presumption is that it was an act of murder. *State v. Shippey*, 223.

2. A party indicted is not entitled to an acquittal on the ground of insanity if at the time of the alleged offence he had capacity sufficient to enable him to distinguish between right and wrong, and understood the nature and consequences of his act, and had mental power sufficient to apply that knowledge to his own case. *Id.*

3. The designed killing of another, without provocation and not in sudden combat, is none the less murder because the perpetrator of the crime is in a state of passion. *Id.*

4. To determine on the sufficiency of the provocation to mitigate the killing from murder to manslaughter, the instrument or weapon with which the homicide was effected must be taken into consideration; if effected by a deadly weapon, the provocation must be great to lower the grade of the crime from murder. *Id.*

5. When the revenge is disproportionate to the injury it can not be said in a legal sense to have been provoked by such injury. *Id.*

6. Self-defence is *ex vi termini* a defensive, not an offensive act, and must not exceed the bounds of mere defence and prevention. To justify such act there must be at least an apparent necessity to ward off by force some bodily harm. *Id.*

7. The mere fact that the defendant believed it necessary for him to act in self-defence would not warrant a "verdict of acquittal." *Id.*

8. The objection that the signature by the foreman of the grand jury on the back of the indictment was not sufficient, not having been taken by motion to set aside the indictment or by demurrer, was waived. *Id.*

9. A new trial is grantable at the instance of the accused in all criminal cases when the evidence was manifestly insufficient to warrant the finding of the jury. *State v. Miller*, 313.

10. The depositions of witnesses taken by a justice of the peace on the examination in a criminal case, are not a part of the record of the proceedings before the justice. *Chapman v. Dodd*, 350.

11. When on an examination in a criminal case, before a Justice of the Peace, all the facts in regard to the commission of the crime charged are stated as within the personal knowledge of the prosecutor, and he is examined before the magistrate, by whom the party charged with the crime is discharged, such discharge is *prima facie* evidence of want of probable cause. The calling of witnesses for the defence on the examination, does not affect the discharge as evidence. *Ibid.*

12. An indictment under *chap. 41, Sess. Laws 1864*, which properly charges the assault with intent to do great bodily harm, and states further a striking, beating, and wounding of the party assailed, does not charge two offences. *State v. Dineen*, 407.

13. A stone may or may not be a dangerous weapon, depending upon its size and other circumstances. *Id.*

14. An indictment under the statute alleged that the defendant "being armed with a dangerous weapon, to wit : a large heavy stone, did make an assault," &c. *Held*—That the allegation was sufficient. *Id.*

15. The arming must take place prior to the assault, but may be at the place of the assault or elsewhere. *Id.*

16. If the arming take place prior to the assault charged, it matters not that the defendant was engaged in a general affray or riot, at the time of the assault. *Ibid.*

17. When two felonies are proved one does not merge in the other. *Id.*

18. In reference to the intent of the defendant in arming, the Court charged that "if the acts and conduct of the defendant were wrongful and purposely done, the felonious intent may be inferred ; a person is presumed to intend what he does, and the jury are left to judge of the intent of the party as the same may be disclosed by all the surrounding circumstances ;" and in a subsequent portion of the charge, with reference to the intent charged in the indictment, gave the law upon this subject to the jury fully and with a careful regard to the rights of the defendant. *Held*—There was no error. *Id.*

19. The defendant requested the Court to charge "that if the jury find from the evidence that at the time and place and in the presence and midst of the disturbance spoken of by the witnesses, the defendant on a sudden and in the heat of a momentary excitement picked from the ground a stone or rock with which he was not previously armed, and struck the blow sworn to, then he is not guilty of the offence charged in the indictment." The Court refused so to charge, and charged that the request was too broad, but that such circumstances might be considered by the jury in determining the question of intent, and gave to the jury the law on the subject of intent. *Held*—There was no error. *Id.*

20. The defendant requested the Court to charge "that if the jury find that any persons to the number of twelve or more, any of whom were armed with dangerous weapons, were riotously or tumultuously assembled at the time of the occurrence, and that this was one of the acts then and there committed, then the crime was riot, and that the defendant cannot even be convicted of an assault, but must be acquitted." The Court refused so to charge. *Held*—There was no error. *Id.*

21. The Court charged the jury that the defendant was presumed innocent until he was proved guilty, that the burthen of proof rested upon the prosecution to establish by competent proof all the material facts alleged in the indictment, of which the criminal intent was one. That it was not merely sufficient that this be done by a preponderance of proof as in civil cases, but the case must be clearly made out to the satisfaction of the jury ; that in order to convict, the

jury must be satisfied beyond a reasonable doubt ; that this does not require unreasonable or impracticable things at the hands of the prosecution, nor absolute certainty ; but the jury should be satisfied as reasonable men so that they would be willing to act upon it in matters of great importance to themselves. The defendant excepted to the last clause of the charge. *Held*—That the last clause qualified all that preceded it, and did not go to the extent of the settled rule ; “matters of great importance,” &c., should have been “matters of the greatest importance,” &c. *Id.*

See PLEADINGS AND PRACTICE, 6.

DAMAGES.

1. In an action for damages for a simple assault and battery, it is not necessary to charge in terms that it was “willful” or “malicious,” to entitle the plaintiff to maintain his action. *Andrews v. Stone*, 72.

2. In such an action when no *special* damages are laid, the plaintiff is not confined to the recovery of merely *nominal* damages, but may recover such general damages as he may prove to have resulted from the injury. *Id.*

3. L. and M. entered into a contract whereby M. was to furnish logs and L. to run certain mills for a specified time, for the purpose of manufacturing said logs into lumber for an agreed price. In an action by L. for a breach of the contract by M. in refusing to furnish logs or to pay for the work done, &c., the complaint set out at length a lease and supplement thereto under which L. held the mills under the St. A. W. P. Co., and the plaintiffs claimed as part of their damages the rate of rent agreed to be paid by the terms of the lease and supplement, from the time of the breach till the expiration of the contract to manufacture. *Held*—that the lease and supplement, together with other allegations of the complaint by which the plaintiffs seek to charge the defendants with the particular rent specified in the lease and supplement as part of their damages, were irrelevant and redundant, and therefore properly stricken out. *Lovejoy et al. v. Morrison et al.*, 137.

4. Under the charter of the Winona and St. Peter Railroad Company, in determining the compensation to be paid for the appropriation of land for railroad purposes, neither the commissioners nor the District Court are confined in their inquiries to the damage done to or the value of the strip of land actually taken for right of way. *Winona & St. Peter R. R. Co. v. Denmark et al.*, 267.

5. It is proper for them to inquire into the effect of such taking upon the whole farm out of which the strip is taken ; and it makes no difference that the Court or Judge, as preliminary to the appointment of commissioners, have determined the title to the strip only. *Id.*

6. In ascertaining such compensation, it is proper to enquire what is the value of the strip taken at the time when the question of compensation is passed upon by the commissioners. *Id.*

7. The expense of building and maintaining additional fences rendered necessary by the construction of the road, is a proper element of damage. *Id.*

8. When a complaint sets up a contract and alleges a breach thereof, a demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action, is not well taken, since the plaintiff is at least entitled to nominal damages. *Cowley v. Davidson*, 392.

See HIGHWAYS AND STREETS, 4. MALICIOUS PROSECUTION, 5.

DEMURRER.

1. The fact that an action is not commenced in the proper county is not an error that deprives the Court of jurisdiction, or that can be reached by demurrer. *Nininger v. Commissioners Carver Co.*, 133.

2. When a complaint sets up a contract and alleges a breach thereof, a demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action, is not well taken, since the plaintiff is at least entitled to nominal damages. *Cowley v. Davidson*, 392.

3. The fact that a complaint does not ask for the proper relief, or asks for inconsistent relief, is not ground of demurrer. *Connor v. Board of Education, St. Anthony*, 439.

4. A motion to dismiss an action based on the ground that plaintiff is a married woman suing alone, and so the Court has no jurisdiction of her person, should be denied. The objection goes to her capacity to sue, and must be taken by answer or demurrer. *Tapley v. Tapley et al.*, 448.

See PLEADINGS AND PRACTICE, 18.

DISTRICT COURT.

1. Habeas corpus proceedings are within the jurisdiction of a Judge of the District Court at chambers. *State ex rel. v. Hill*, 63.

2. Under the State Constitution the District Court is a court of general jurisdiction, and has original jurisdiction in civil actions, although the amount in controversy may be less than one hundred dollars. *Thayer v. Cole*, 215.

3. Action by plaintiff against defendant under chap. 76 of Comp. Stat. Held—that the remedy given by this chapter is a "common law remedy," and is therefore saved to suitors by the judiciary act of the United States passed in 1789. That the District Courts of this State have jurisdiction in this class of cases. *Reynolds v. Steamboat Favorite*, 242; *Morin v. Steamboat F. Sigel*, 250.

DURESS.

1. Where a married woman objects to signing a deed of real property and is thereupon addressed by her husband in harsh, threatening and abusive language (though not in the presence of the acknowledging officer) and immediately thereafter in the presence of her husband she acknowledges the same to be her

voluntary act, &c., the presence of the husband is a coercive presence; the acknowledgment is not taken "separately apart" from her husband in the spirit and meaning of the statute, and the instrument is ineffectual to pass her interest in the land. *Edgerton et al. v. Jones et al.*, 427.

2. Threats by a husband to separate from his wife, accompanied by general abusive treatment, will constitute duress so as to avoid a deed executed by her under a reasonable apprehension that they will be carried into effect. *Tapley v. Tapley et al.*, 448.

EJECTMENT.

1. The plaintiff in the action is not entitled to a second trial under *sec. 5, chap. 64, p. 595, Pub. Stat.* *Howe v. Gillett*, 397.

2. An order granting a plaintiff a second trial in such case is appealable. *Id.*

ELECTIONS AND ELECTION LAW.

1. At a general election where the judges and clerks of election do not take the prescribed oath, or any oath, and no list of qualified electors is kept as provided by law, and the judges are candidates, it is the duty of the canvassing board to canvass the returns, and their certificate is *prima facie* evidence of the result of the election. The burden of proof is on a contestant to show that the errors complained of affected the result or rendered it uncertain. *Taylor v. Taylor et al.*, 107.

2. If the votes of the citizens are freely and fairly deposited, at the time and place designated by law, the intent and design of the election are accomplished. It is the will of the electors thus expressed that gives the right to the office, or determines the question submitted, and the failure of the officers to perform a mere ministerial duty in relation to the election, can not invalidate it if the electors had actual notice and there was no fraud, mistake or surprise. *Id.*

3. If the officers of election fail to perform their duty the law provides a penalty, but the election is not necessarily rendered void. *Id.*

4. The object of requiring the "points" of contest to be stated, where an election is contested, is for the purpose of informing the adverse party of the grounds of contest, so that he may prepare to meet them and may not be taken by surprise; each party to a contested election is therefore required when he becomes actor to give notice of the *specific* grounds on which he intends to assail either the election or the correctness of the returns or canvass. *Id.*

5. *Sec. 1, Art. 11 of the Constitution* requires only (for the adoption of such law) a majority of the electors present and voting at such election. [Berry, J., dissenting.] *Id.*

6. As a general rule it is the duty of every elector to attend and vote at the general elections, and the law presumes that every citizen does his duty. In the eye of the law, therefore, those present and voting at such election constitute the electors of the county. *Id.*

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7. A County Auditor may act by deputy in the canvass of votes. *Crowell v. Lambert*, 389.

8. Where, upon the canvass of votes cast at a general election, C. was declared duly elected to the office of Judge of Probate, received a certificate, qualified as by law required, and made a demand upon his predecessor for the books, &c., of the office, it appearing that L.'s term of office had expired; *Held*—that upon the refusal of L. to deliver up the records, C. was entitled to a peremptory writ of mandamus to enforce the delivery. *Id.*

ESTOPPEL.

1. The defendant having mortgaged to the plaintiff certain land, the plaintiff foreclosed the mortgage. The plaintiff afterward, supposing the mortgage sale to be void or irregular, commenced an action to have it set aside and a re-sale ordered. The defendant appeared in the action and prayed that the sale might not be set aside, and offered to quit-claim to plaintiff his interest in the premises. On his filing said quit-claim deed, the Court refused to set aside the deed. *Held*—that said sale having been confirmed at the instance of defendant, he can not now be heard to deny its validity, and that the plaintiff may maintain an action for the balance due on the notes secured by said mortgage. *Blake v. McKusick*, 251.

2. As a general rule a verdict does not operate as an estoppel until it has received the sanction of the Court and has passed into a judgment. *Schurmeier v. Johnson et al.*, 319.

See ANSWER, 2.

EVIDENCE.

1. Where an election is contested the burden of proof is on the contestant to show that the error complained of affected the result or rendered it uncertain, and the certificate of the canvassing board is *prima facie* evidence of the result of such election. *Taylor v. Taylor et al.*, 107.

2. It appearing that the defendant deliberately and intentionally shot the deceased, the presumption is that it was an act of murder. *State v. Shippey*, 223.

3. A party indicted is not entitled to an acquittal on the ground of insanity if at the time of the alleged offence he had capacity sufficient to enable him to distinguish between right and wrong, and understood the nature and consequences of his act, and had mental power sufficient to apply that knowledge to his own case. *Id.*

4. Where a negotiable note payable to order is transferred without indorsement, the holder takes it as a mere chose in action, and while he may maintain an action upon it in his own name, he must prove the transfer to himself if denied, and mere possession is not *prima facie* evidence of ownership. *Van Eman v. Stanchfield et al.*, 255.

5. The rule that parol evidence is inadmissible to contradict or vary the terms of a valid written instrument, applies only between parties to the instrument and their privies. *Id.*

4. A docket kept by the Clerk of the Court, marked in gilt letters "Register of Actions," and in writing "Judgment Book," contained a series of entries, the last of which was without date and in the following form: "Judgment entered against defendant and in favor of said plaintiff for three hundred and twenty-eight dollars and fifty cents [\$328.50]." All the entries preceding it and with which it was connected were mere minutes of the proceedings in the action. *Held*—that the entry referring to judgment was a mere minute of the entry of judgment. *Brown v. Hathaway et al.*, 303.

7. A docket entry which is a mere minute is not admissible to prove a judgment. *Id.*

8. The obligation not to give time to the principal depends upon a knowledge of the real character in which the surety entered into the contract. If, therefore, the fact of the suretyship does not appear on the face of the contract, the surety will not be discharged from liability in consequence of a variation of the contract, if at the time of the act complained of the creditor had not notice that the relation of suretyship existed; and such notice is not presumed in favor of the surety, but must be proven. *Agnew v. Merritt et al.*, 308.

9. In the absence of fraud or mistake, parol evidence is inadmissible at law or in equity to vary a written contract. *Schurmeier v. Johnson et al.*, 319.

10. Where a criminal docket is kept by a justice of the peace and a record made of proceedings before such Justice the record is competent evidence. No signature to the docket is required; it may be identified by the Justice or any other competent evidence. *Chapman v. Dodd*, 350.

11. In an action for malicious prosecution, the complaint, after alleging the examination before the Justice, avers: "at which examination the defendant did not appear to support his said complaint, and upon such examination the said Justice adjudged that the plaintiff was not guilty of such offence, and that there was no probable cause for charging him therewith, and fully acquitted him thereof." The record offered showed, that upon the examination the complainant did not appear, and as there was no witness for the prosecution the case was dismissed and the prisoner discharged, &c. *Held*—That the docket was admissible to show the termination of the prosecution, and that there was no variance between the proof and allegation. *Id.*

12. The reasons of a Justice of the Peace for the discharge of a defendant can not be shown to impeach his record, and for other purposes are immaterial. *Id.*

13. In an action for malicious prosecution the conduct and declarations of the defendant toward the plaintiff about the time of the prosecution, tend to char-

acterize the *animus* of the defendant, and are proper to go to the jury to show express malice. *Id.*

14. The only effect of sections 15 and 25, of chap. 103, *Comp. Stat.*, is to relieve the examinations of witnesses, taken in accordance with their provisions, of their otherwise extra-judicial character; the same rules are applicable to them as evidence which apply to other depositions. When the witness himself may be produced, the deposition is not admissible. *Id.*

15. Probable cause does not depend on the actual state of the case in point of fact, but upon the honest and reasonable belief of the party commencing the prosecution. The facts or circumstances upon which the prosecutor acted must constitute probable cause. The existence of the facts is an original question upon the trial for malicious prosecution, and is to be found as any other fact. The testimony of witnesses given upon the trial of the criminal action cannot be proved but by the witnesses themselves, or if they are dead, by the usual secondary evidence. *Id.*

16. As under our legislation the defendant is a competent witness, he stands in the same position as other witnesses. *Id.*

17. When on an examination in a criminal case, before a Justice of the Peace, all the facts in regard to the commission of the crime charged are stated as within the personal knowledge of the prosecutor, and he is examined before the magistrate, by whom the party charged with the crime is discharged, such discharge is *prima facie* evidence of want of probable cause. The calling of witnesses for the defence on the examination, does not affect the discharge as evidence. *Ibid.*

18. S. S. Eaton, defendant, deposited in the First National Bank money in name of "S. S. Eaton, Agent." *Held*—That this was not conclusive evidence that the money was the property of said Eaton, and the officers of the Bank having denied any indebtedness to him, or the possession or control of any money or effects belonging to him, the plaintiffs could not proceed farther against the garnishee without filing a supplemental complaint as provided in ch. 70, *Laws of 1860. Ingersoll et al. v. First National Bank, Garnishee, &c.*, 396.

See CONVEYANCE, 2. CRIMINAL LAW, 18, 19, 21.

FEEES.

See GARNISHMENT, 2. JUSTICE OF THE PEACE, 1, 2, 3. COUNTY TREASURER, 1.

FERRIES.

1. The mere fact of riparian ownership does not authorize a riparian owner to run a public ferry to and from his own shore. The establishment and regulation of ferries is a subject under the control of the Legislature. A ferry franchise is property. A grant of a ferry franchise by the Legislature is a contract within

the meaning of that provision of the Constitution prohibiting the passage of laws impairing the obligation of contracts. *McRoberts v. Washburne et al.*, 23.

2. Invasions of a ferry franchise may be restrained by injunction. *Id.*

FORECLOSURE.

See MORTGAGE.

FRAUD AND FRAUDULENT CONVEYANCES.

1. A conveyance of real estate by husband to wife will be upheld as a suitable provision for her maintenance when it appears to be a fair transaction, not made in fraud of creditors and not unreasonable in its amount, taking into consideration all the circumstances of the case. *Wilder et al. v. Brooks et al.*, 50.

GARNISHMENT.

1. In removing the default of a garnishee and permitting him to disclose, it is necessary to fix a time and place for his disclosure. *Goodrich et al. v. Hopkins, et al.*, 162.

2. A person summoned as garnishee is not entitled to payment in advance of his fees for travel and attendance. *Id.*

3. S. S. Eaton, defendant, deposited in the First National Bank money in name of "S. S. Eaton, Agent." *Held*—That this was not conclusive evidence that the money was the property of said Eaton, and the officers of the Bank having denied any indebtedness to him, or the possession or control of any money or effects belonging to him, the plaintiffs could not proceed farther against the garnishee without filing a supplemental complaint as provided in chapter 70 of the Laws of 1860. *Ingersoll et al. v. First National Bank, Garnishee, &c.* 396.

HABEAS CORPUS.

1. Habeas corpus proceedings are within the jurisdiction of a Judge of the District Court at chambers. *State ex rel. v. Hill*, 63.

2. Under our constitution and laws a Court Commissioner has jurisdiction to grant a writ of habeas corpus returnable before himself, and proceed to the hearing and determination thereof, where the prisoner is detained in the county in which he resides; and the Court Commissioner of one county has like jurisdiction in cases where the prisoner is detained in an adjoining county, if it properly appears that there is no officer in such adjoining county authorized to grant the writ, or if there be one, that he is absent or for any cause be incapable of acting, or has refused to grant the writ. *Id.*

See SUPREME COURT, 1, 2.

HIGHWAYS AND STREETS.

1. The owner of lands who plats the same into blocks, lots, streets, &c., according to the statutes retains the fee in such streets subject to the public easement. *Schurmeier v. St. Paul & P. R. R. Co.*, 82.

2. The Legislature cannot appropriate land laid out into streets, &c., for any use not authorized by the dedication, nor authorize a Railroad Company to use the same for a railroad track without compensation to the owner of the fee. *Id.*

3. The use of streets and public landings by a Railroad Company for a railroad track without legal authority, may be restrained by injunction by the owner of the fee, when such use is a special injury to him. *Id.*

4. An appeal does not lie from the assessment of damages by the board of county commissioners, made in pursuance of the provisions of *Chap. 68, Sess. Laws 1862*, providing for the location, change and vacation of highways. *Kernig v. Winona County*, 238.

HOMESTEAD.

1. Without reference to the amendment of 1860, our statute exempts as a homestead a quantity of land not exceeding one lot in any incorporated city, and no restriction is placed upon the uses of any part of it, provided it is the dwelling place of the claimant. *Kelly v. Baker et al.*, 154.

HOMICIDE.

1. It appearing that the defendant deliberately and intentionally shot the deceased, the presumption is that it was an act of murder. *State v. Shippey*, 223.

2. A party indicted is not entitled to an acquittal on the ground of insanity if at the time of the alleged offence he had capacity sufficient to enable him to distinguish between right and wrong, and understood the nature and consequences of his act, and had mental power sufficient to apply that knowledge to his own case. *Id.*

3. The designed killing of another, without provocation and not in sudden combat, is none the less murder because the perpetrator of the crime is in a state of passion. *Id.*

4. To determine on the sufficiency of the provocation to mitigate the killing from murder to manslaughter, the instrument or weapon with which the homicide was effected must be taken into consideration; if effected by a deadly weapon, the provocation must be great to lower the grade of the crime from murder. *Id.*

5. When the revenge is disproportionate to the injury it can not be said in a legal sense to have been provoked by such injury. *Id.*

6. Self-defence is *ex vi termini* a defensive, not an offensive act, and must not exceed the bounds of mere defence and prevention. To justify such act there must be at least an apparent necessity to ward off by force some bodily harm. *Id.*

7. The mere fact that the defendant believed it necessary for him to act in self-defence would not warrant a "verdict of acquittal." *Id.*

HUSBAND AND WIFE.

1. A conveyance of real estate by husband to wife will be upheld as a suitable provision for her maintenance when it appears to be a fair transaction, not made in fraud of creditors and not unreasonable in its amount, taking into consideration all the circumstances of the case. *Wilder et al. v. Brooks et al.*, 50.

2. When a married woman sues for her separate property, her husband is not a necessary party, plaintiff or defendant. *Nininger v. Com'rs Carver Co.*, 133.

3. Where a married woman objects to signing a deed of real property and is thereupon addressed by her husband in harsh, threatening and abusive language (though not in the presence of the acknowledging officer) and immediately thereafter in the presence of her husband she acknowledges the same to be her voluntary act, &c., the presence of the husband is a coercive presence; the acknowledgment is not taken "separately apart" from her husband in the spirit and meaning of the statute, and the instrument is ineffectual to pass her interest in the land. *Edgerton et al. v. Jones et al.*, 427.

4. A motion to dismiss an action based on the ground that plaintiff is a married woman suing alone, and so the Court has no jurisdiction of her person, should be denied. The objection goes to her capacity to sue, and must be taken by answer or demurrer. *Tapley v. Tapley et al.*, 448.

5. Threats by a husband to separate from his wife, accompanied by general abusive treatment, will constitute duress so as to avoid a deed executed by her under a reasonable apprehension that they will be carried into effect. *Tapley v. Tapley et al.*, 448.

INDICTMENT.

1. The objection that the signature by the foreman of the grand jury on the back of the indictment was not sufficient, not having been taken by motion to set aside the indictment or by demurrer, was waived. *State v. Shippey*, 223.

2. An indictment under *chap. 41, Sess. Laws 1864*, which properly charges the assault with intent to do great bodily harm, and states further a striking, beating, and wounding of the party assailed, does not charge two offences. *State v. Dineen*, 407.

3. A stone may or may not be a dangerous weapon, depending upon its size and other circumstances. *Id.*

4. An indictment under the statute alleged that the defendant "being armed with a dangerous weapon, to wit: a large heavy stone, did make an assault," &c. *Held*—That the allegation was sufficient. *Id.*

INJUNCTION.

1. Invasions of a ferry franchise may be restrained by injunction. *McRoberts v. Washburne et al.*, 23.

2. The use of streets and public landings by a Railroad Company for a railroad track, without legal authority, may be restrained by injunction by the

owner of the fee, when such use is a special injury to him. *Schurmeier v. St. P. & P. R. R. Co.*, 82.

JUDGMENT.

1. Where a judgment of the District Court is reversed in the Supreme Court and the case remanded, and no final disposition has been made of it, the action in which such judgment was recovered is *pending*, and a complaint in a suit brought upon the same cause of action upon which the judgment was founded, and between the same parties in interest, and alleging these facts, is demurrable. *Cupehart v. Van Campen*, 158.

2. In an action for damages resulting from the upsetting of the plaintiff's carriage, if the complaint fails to charge, either directly or by implication, that the defendant was the cause of the upset, judgment will be arrested after verdict on motion. *Lee v. Emery et al.*, 187.

3. An error of the Court concerning an abstract proposition having nothing to do with the matter in hand, is not sufficient ground for reversing a judgment. *State v. Shippey*, 223.

4. A docket kept by the Clerk of the Court, marked in gilt letters "Register of Actions," and in writing "Judgment Book," contained a series of entries, the last of which was without date and in the following form: "Judgment entered against defendant and in favor of said plaintiff for three hundred and twenty-eight dollars and fifty cents [\$328.50]." All the entries preceding it and with which it was connected were mere minutes of the proceedings in the action. *Held*—that the entry referring to judgment was a mere minute of the entry of judgment. *Brown v. Hathaway et al.*, 303.

5. A docket entry which is a mere minute is not admissible to prove a judgment. *Id.*

6. Where an indebtedness is payable out of a particular fund, the judgment must be executed out of that fund. *Robbins v. School Dist. No. 1, Anoka Co.*, 340.

JURISDICTION.

1. The fact that an action is not commenced in the proper county is not an error that deprives the Court of jurisdiction, or that can be reached by demurrer. *Nininger v. Commissioners Carver Co.*, 133.

2. A summons can only be served on a foreign corporation by publication. *Sullivan v. La Crosse & Minn. Packet Co.*, 386.

3. Service on the President or managing agent of such corporation within this State is a nullity, and confers no jurisdiction on the Court, and in such case the defendant may maintain a writ of error to reverse the judgment. *Id.*

See TITLES OF VARIOUS COURTS.

JURY.

1. In the Court below, there being a deficiency of jurors, the Court summoned

by a special venire a number of persons to serve as jurors for the term. Subsequently when this cause was called, a challenge was interposed by defendant's counsel to the regular panel, and said challenge was allowed. The Court then—the defendant objecting thereto, ordered the Clerk to draw a jury for the trial of the cause from the jurors summoned on the special venire. *Held*—not to be error. *Dayton et al. v. Warren*, 233.

See MALICIOUS PROSECUTION, 5.

JUSTICE OF THE PEACE.

1. Sec. 150, Chap. 59, *Comp. Stat.*, makes the payment of the costs and the fee for the return essential conditions to the jurisdiction of a justice of the peace to allow an appeal in a civil action. *Trigg v. Larson*, 220.

2. When it appears from the return of the justice that the fee for the return has not been paid, the appeal may be dismissed. *Id.*

3. In a civil action the party against whom a judgment is rendered in justice's court, is entitled to appeal without paying his own witnesses. *Id.*

4. Where a criminal docket is kept by a justice of the peace and a record made of proceedings before such Justice the record is competent evidence. No signature to the docket is required; it may be identified by the Justice or any other competent evidence. *Chapman v. Dodd*, 350.

5. The depositions of witnesses taken by a justice of the peace on the examination in a criminal case, are not a part of the record of the proceedings before the justice. *Id.*

6. The reasons of a Justice of the Peace for the discharge of a defendant can not be shown to impeach his record, and for other purposes are immaterial. *Id.*

7. On an appeal from a Justice of the Peace, none of the appeal papers are subject to a stamp duty. *Dorman v. Bayley*, 383.

MALICIOUS PROSECUTION.

1. In an action for malicious prosecution, the complaint, after alleging the examination before the Justice, avers: "at which examination the defendant did not appear to support his said complaint, and upon such examination the said Justice adjudged that the plaintiff was not guilty of such offence, and that there was no probable cause for charging him therewith, and fully acquitted him thereof." The record offered showed, that upon the examination the complainant did not appear, and as there was no witness for the prosecution the case was dismissed and the prisoner discharged, &c. *Held*—That the docket was admissible to show the termination of the prosecution, and that there was no variance between the proof and allegation. *Chapman v. Dodd*, 350.

2. Where a complaint charges a crime and the prosecution is instituted before a tribunal having jurisdiction, and the defendant arrested upon a warrant regular upon its face, an action for malicious prosecution will lie. *Id.*

3. In an action for malicious prosecution the conduct and declarations of the defendant toward the plaintiff about the time of the prosecution, tend to characterize the *animus* of the defendant, and are proper to go to the jury to show express malice. *Id.*

4. Probable cause does not depend on the actual state of the case in point of fact, but upon the honest and reasonable belief of the party commencing the prosecution. The facts or circumstances upon which the prosecutor acted must constitute probable cause. The existence of the facts is an original question upon the trial for malicious prosecution, and is to be found as any other fact. The testimony of witnesses given upon the trial of the criminal action cannot be proved but by the witnesses themselves, or if they are dead, by the usual secondary evidence. *Id.*

5. The jury are the proper judges of the amount of damages to be allowed in actions of this kind, and unless there is something in the case showing that the jury in their determination were influenced by passion, prejudice, or some improper motive, the Court will not interfere to disturb their verdict. *Id.*

MANDAMUS.

1. The Supreme Court has authority to issue the peremptory writ of mandamus. *Crowell v. Lambert*, 369.

2. Where, upon the canvass of votes cast at a general election, C. was declared duly elected to the office of Judge of Probate, received a certificate, qualified as by law required, and made a demand upon his predecessor for the books, &c., of the office, it appearing that L.'s term of office had expired; *Held*—that upon the refusal of L. to deliver up the records, C. was entitled to a peremptory writ of mandamus to enforce the delivery. *Id.*

See SCHOOLS AND SCHOOL DISTRICTS, 7.

MERGER.

1. The plaintiff having the legal title to a tract of land on which there were two mortgages, purchased and took an assignment of the first. The Judge who tried the cause below, found as a matter of fact, that the plaintiff did not, in taking the assignment of said mortgage, intend either that it should be extinguished or merged, or that it should not remain a valid or first lien upon the premises therein described; and also found that it was for the interest of the plaintiff that said mortgage should remain a lien. *Held*—That the estate or interest thus purchased by the plaintiff did not merge in the legal estate. *Davis v. Pierce et al.*, 376.

MORTGAGE.

1. Where a mortgage is foreclosed by advertisement the time of redemption is governed by the law in force when the mortgage was executed; and a sheriff's certificate prescribing a different time for such redemption, can in no way affect the rights of any of the parties, and the acceptance of such a certificate by a

purchaser is not a waiver of his legal rights in any respect. *Carroll v. Rossiter*, 174.

2. The defendant having mortgaged to the plaintiff certain land, the plaintiff foreclosed the mortgage. The plaintiff afterward, supposing the mortgage sale to be void or irregular, commenced an action to have it set aside and a re-sale ordered. The defendant appeared in the action and prayed that the sale might not be set aside, and offered to quit-claim to plaintiff his interest in the premises. On his filing said quit-claim deed, the Court refused to set aside the deed. *Held*—that said sale having been confirmed at the instance of defendant, he can not now be heard to deny its validity, and that the plaintiff may maintain an action for the balance due on the notes secured by said mortgage. *Blake v. McKusick*, 251.

3. The plaintiff having the legal title to a tract of land on which there were two mortgages, purchased and took an assignment of the first. The Judge who tried the cause below, found as a matter of fact, that the plaintiff did not in taking the assignment of said mortgage, intend either that it should be extinguished or merged, or that it should not remain a valid or first lien upon the premises therein described; and also found that it was for the interest of the plaintiff that said mortgage should remain a lien. *Held*—that the estate or interest thus purchased by the plaintiff did not merge in the legal estate. *Davis v. Pierce et al.*, 376.

4. P. mortgages to B. a forty acre tract and subsequently conveys to S. two and a half acres of said tract. B. afterward, and with full knowledge of the conveyance to S., forecloses the mortgage by advertisement, in pursuance of the power of sale contained in the mortgage, and sells the premises as one tract. *Held*—not to be error. *Paquin v. Braley*, 379.

5. In pursuance of the power of sale in a mortgage, B. (a mortgagee) advertised for sale the mortgaged premises, and the sheriff, acting as his agent, at the time and place fixed, offered said premises for sale, and B. bid them off for \$500. After the sheriff had sold certain other lands, and in fifteen or twenty minutes after the first sale, he re-offered the premises first sold, and they were again bid off by B. for \$542.26. *Held*—That the power of the sheriff or B. to sell was exhausted by the first sale, and therefore the second sale was a nullity. *Id.*

NEGLIGENCE.

1. Negligence is a question of fact, or mixed fact and law, and in pleading it is only necessary to aver negligence generally, not the specific facts constituting negligence. *McCaully v. Davidson et al.*, 418.

See BANK, 1, 2.

NEW TRIAL.

1. A new trial is grantable at the instance of the accused in all criminal cases

when the evidence was *manifestly* insufficient to warrant the finding of the jury. *State v. Miller*, 313.

PARTIES.

1. The State of Minnesota has capacity to sue. *State v. Grant*, 39.
2. When a married woman sues for her separate property, her husband is not a necessary party, plaintiff or defendant. *Nininger v. Com'rs Carver Co.*, 133.
3. An agreement was entered into between several persons whereby certain personal property was conveyed for specified purposes and trusts to several parties, one of whom was made trustee for the others. In an action brought by the party who owned the property at the time of the conveyance, (and to whom any surplus remaining after the trusts were fulfilled was to be paid,) for an accounting and payment over; *Held*—that all the parties to the agreement having a subsisting interest should be made parties to the action. *Fish v. Berkey et al.*, 199.
4. The German Land Association, being a mere voluntary association of persons unincorporated, has no legal capacity to take or hold real property; nor can such Association be the beneficiary of a trust. A deed, therefore, to A, B & C, in trust for such Association, is void. *German Land Association v. Scheller*, 331.

See COMPLAINT, 1.

PARTNERSHIP.

1. I. B., J. R. M. and H. E. B. entered into a banking partnership under the style of Bidwell's Exchange Bank, subject to a stipulation by which J. R. M. was permitted to take a fixed salary in lieu of a share of the profits. J. R. M. elected to take and did take the salary. *Held*—That notwithstanding this election I. B. and H. E. B. remained partners as between themselves. *Bidwell et al. v. Madison*, 13.

PLEADINGS AND PRACTICE.

1. A certiorari lies to review the action of the District Court, dismissing a proceeding authorized by chapter 129 of the public statutes, providing for the erection of mill dams and mills in certain cases. *Faribault et al. v. Hulett*, 30.
2. If the facts stated in the petition in such proceeding are such as bring the case within the first section of the chapter of the statutes referred to, the jurisdiction of the Court is complete, although the right to the relief sought may depend on other circumstances. *Id.*
3. If there be an exception in the enacting clause of a statute, it must be negatived in pleading, but a proviso need not. *Id.*
4. The petition fully describes the several pieces of land which may be injured by erection of the proposed dam, and states the respective owners thereof who are other persons than the petitioners. *Held*—that this shows sufficiently that the petitioners are not the owners of the land which will be injured. *Id.*

5. When an injury is alleged to persons or property, the law presumes *prima facie* want of consent to the injury; it need not, therefore, be expressly alleged in the first instance. *Id.*

6. In a recognizance in a criminal case entered into by the defendant and a surety conditioned for the appearance of the defendant to answer, &c., it is not essential that the surety be called; if the defendant is called and fails to appear it is a breach of the recognizance, although the better practice is to call the surety also. *State v. Grant*, 39.

7. In an action upon a recognizance it is not necessary to allege that the penalty has not been paid. *Id.*

8. The proceedings in case of the forfeiture of a recognizance are prescribed by statute, *chapter 103, sections 28-9-30-1*; all that would seem to be required by this statute before bringing an action to recover the penalty of the recognizance, is a record of the default of the person under recognizance. *Id.*

9. The only matters embraced within the purview of *Sec. 1, Chap. 64 of the Comp. Stat.*, are claims to *estates or interests* in real property adverse to the occupant. *Bidwell v. Webb*, 59.

10. The lien conferred by the eighth section of the act, entitled "An act in relation to the redemption of lands sold for taxes and relating to taxes and tax sales," approved March 11, 1862, cannot be adjudicated in an action under *Sec. 1, Chap. 64 of the Comp. Stat.*, but the purchaser at the tax sale must resort to a separate action to enforce such lien. *Id.*

11. An order of the District Court setting aside an order made by a Court Commissioner in a habeas corpus proceeding discharging the relator, is an appealable order. *State ex rel. v. Hill*, 63.

12. Habeas corpus proceedings are within the jurisdiction of a Judge of the District Court at chambers. *Id.*

13. Under our constitution and laws a Court Commissioner has jurisdiction to grant a writ of habeas corpus returnable before himself, and proceed to the hearing and determination thereof, where the prisoner is detained in the county in which he resides; and the Court Commissioner of one county has like jurisdiction in cases where the prisoner is detained in an adjoining county, if it properly appears that there is no officer in such adjoining county authorized to grant the writ, or if there be one, that he is absent or for any cause be incapable of acting, or has refused to grant the writ. *Id.*

14. The complaint shows that before the commencement of this action the plaintiff "was lawfully seized and possessed of Block 23 in the town of Kasota, Le Sueur County, composed and comprising ten distinct and separate lots, numbered from one to ten inclusive, which piece, parcel or tract of land had been surveyed and platted as aforesaid, and the plat thereof filed in the office of the

Register of Deeds for said county, during the year 1855." It is admitted by plaintiff's counsel that said Block was originally assessed as one tract. In 1862 the plaintiff was the owner of the Block, and there were then on it taxes for 1859 and previous years. In January, 1863, the taxes remaining unpaid, the Block (as one tract) was sold in pursuance of the provisions of Chapter 4 of the Laws of 1862. The plaintiff in his complaint alleges "That said sale is totally void and of none effect, for the reason that said block being subdivided as herein before set forth, into lots, was not offered and sold in separate parcels, but as a whole tract." This action is brought to have said sale declared invalid for that reason. The validity of the assessment is not questioned except as in the portions of the complaint above quoted. *Held*—that in this case we can only take into account errors that are properly and peculiarly errors in the sale as distinguished from those that are errors in the assessment and proceedings antecedent to the notice of sale. That the Block having been originally assessed as a single tract, the Treasurer had no authority to sell in lots, nor, having sold it as one tract, had he any authority to permit a redemption of two lots without a payment of the whole tax due. That in the sale of the Block as one parcel, there was no error. *Moulton v. Doran et al.*, 67.

15. That facts in a pleading must be alleged directly and positively, and not by way of rehearsal, argument, reference or reasoning, and if not thus alleged they are not admitted by a failure to traverse them. *Id.*

16. That in this case it is not alleged in a traversable form, or positively alleged at all, that said block was legally subdivided into lots. *Id.*

17. In an action for damages for a simple assault and battery, it is not necessary to charge in terms that it was "willful" or "malicious," to entitle the plaintiff to maintain his action. *Andrews v. Stone*, 72.

18. In such an action when no special damages are laid, the plaintiff is not confined to the recovery of merely nominal damages, but may recover such general damages as he may prove to have resulted from the injury. *Id.*

19. An undertaking (given on appeal from an order,) by which the parties executing the same agree in case a certain judgment be affirmed in whole or in part to pay such judgment, or the part as to which it is affirmed, will not support an action against such parties where it appears that as a matter of fact no such judgment was ever rendered. *Galloway v. Yates et al.*, 75.

20. The refusal to pay a judgment entered in accordance with the affirmation of the order appealed from in such case, is not a breach of the undertaking. *Id.*

21. The use of streets and public landings by a Railroad Company for a railroad track, without legal authority, may be restrained by injunction by the owner of the fee, when such use is a special injury to him. *Schurmeier v. St. P. & P. R. R. Co.*, 82.

22. The object of requiring the "points" of contest to be stated, where an election is contested, is for the purpose of informing the adverse party of the grounds of contest, so that he may prepare to meet them and may not be taken by surprise; each party to a contested election is therefore required, when he becomes actor to give notice of the *specific* grounds on which he intends to assail either the election or the correctness of the returns or canvass. *Taylor v. Taylor et al.*, 107.

23. The fact that an action is not commenced in the proper county is not an error that deprives the Court of jurisdiction, or that can be reached by demurrer. *Nininger v. Commissioners Carver Co.*, 133.

24. When a married woman sues for her separate property, her husband is not a necessary party, plaintiff or defendant. *Nininger v. Com'rs Carver Co.*, 133.

25. From the allegation (admitted by the demurrer,) that the "defendants executed in due form of law and issued" the bond in question, it will be presumed that they executed it in the mode required by law. *Id.*

26. The plaintiff having alleged that she purchased the bond on which the suit is brought, and our law authorizing her to make purchases of this kind, it will be presumed that the purchase was for herself and not for her husband, and with money that was her separate property. *Id.*

27. L. and M. entered into a contract whereby M. was to furnish logs and L. to run certain mills for a specified time, for the purpose of manufacturing said logs into lumber for an agreed price. In an action by L. for a breach of the contract by M. in refusing to furnish logs or to pay for the work done, &c., the complaint set out at length a lease and supplement thereto under which L. held the mills under the St. A. W. P. Co., and the plaintiffs claimed as part of their damages the rate of rent agreed to be paid by the terms of the lease and supplement, from the time of the breach till the expiration of the contract to manufacture. *Held*—that the lease and supplement, together with other allegations of the complaint by which the plaintiffs seek to charge the defendants with the particular rent specified in the lease and supplement as part of their damages, were irrelevant and redundant, and therefore properly stricken out. *Lovejoy et al. v. Morrison et al.*, 136.

28. In an action for damages resulting from the upsetting of the plaintiff's carriage, if the complaint fails to charge, either directly or by implication, that the defendant was the cause of the upset, judgment will be arrested after verdict, on motion. *Lee v. Emery et al.*, 187.

29. When the case is not one of variance, but of failure of proof, under *sec. 92, p. 544, Pub. Stat.*, a motion for amendment is addressed to the discretion of the Court under *sec. 94*, and no appeal lies from an order denying such amend-

ment unless a gross abuse of discretion is clearly established. *White et al. v. Culver*, 192.

30. Where a judgment of the District Court is reversed in the Supreme Court and the case remanded, and no final disposition has been made of it, the action in which such judgment was recovered is *pending*, and a complaint in a suit brought upon the same cause of action upon which the judgment was founded, and between the same parties in interest, and alleging these facts, is demurrable. *Capehart v. Van Campen*, 158.

31. Sec. 17, page 627, *Pub. Stat.*, so far as it requires eight days' notice of a motion, does not have reference to orders to show cause. *Goodrich et al. v. Hopkins et al.*, 162.

32. The granting of an order to show cause why a motion should not be allowed, implies leave to renew the motion if it has been previously made. *Id.*

33. In removing the default of a garnishee and permitting him to disclose, it is necessary to fix a time and place for his disclosure. *Id.*

34. A person summoned as garnishee is not entitled to payment in advance of his fees for travel and attendance. *Id.*

35. An appeal lies from an order striking out portions of an answer. *Starbuck v. Dunklee*, 168.

36. Where a contract for the performance of certain services at an agreed price is admitted to be in full force, an allegation in an answer that services performed by the defendant under the contract were of a specified value is immaterial and irrelevant. *Id.*

37. When the answer admits the receiving of a large quantity of wood for transportation, the defendant is not permitted to deny any knowledge whether the quantity was as alleged in the complaint or otherwise unless he shows some excuse for his want of knowledge upon the subject. *Id.*

38. A denial of all the allegations of a complaint except what the Court may construe to be admitted in the foregoing part of the answer, is bad. *Id.*

39. When a foreign corporation demurs to a complaint in the District Court, it appears and thereby confers upon the Court jurisdiction over it. *Reynolds v. La Crosse & Minn. Packet Co.*, 178.

40. The complaint contained four counts—three upon contract, one for tort. A demurrer being overruled, the clerk below made up the damages for judgment and entered judgment as upon failure to answer, and included therein the amount claimed under the fourth count of the complaint. *Held*—that this was error. *Held*—further, that this Court will correct the error without requiring application for correction to be first made to the Court below, overruling in this respect the case of *Babcock et al. vs. Sanborn et al.* 3 Minn., 141. *Id.*

41. An agreement was entered into between several persons whereby certain personal property was conveyed for specified purposes and trusts to several parties, one of whom was made trustee for the others. In an action brought by the party who owned the property at the time of the conveyance, (and to whom any surplus remaining after the trusts were fulfilled was to be paid,) for an accounting and payment over; *Held*—that all the parties to the agreement having a subsisting interest should be made parties to the action. *Fish v. Berkey et al.*, 199.

42. In an action to reform a written contract and for damages for its breach, the jury rendered a special verdict for the plaintiff, and subsequently to the verdict the plaintiff by leave of Court amended his complaint, setting forth as the real contract, one different from that found by the jury to be the true one; *Held*—that on a motion for a decree of reformation of the contract in accordance with the complaint as amended, the motion was properly denied. *Wilson v. McCormick et al.*, 216.

43. An error of the Court concerning an abstract proposition having nothing to do with the matter in hand, is not sufficient ground for reversing a judgment. *State v. Shippey*, 223.

44. The objection that the signature by the foreman of the grand jury on the back of the indictment was not sufficient, not having been taken by motion to set aside the indictment or by demurrer, was waived. *Id.*

45. The plaintiff in the action is not entitled to a second trial under *sec. 5, chap. 64, p. 595, Pub. Stat.* *Howe v. Gillett*, 397.

46. An order granting a plaintiff a second trial in such case is appealable. *Id.*

47. In the Court below, there being a deficiency of jurors, the Court summoned by a special venire a number of persons to serve as jurors for the term. Subsequently when this cause was called, a challenge was interposed by defendant's counsel to the regular panel, and said challenge was allowed. The Court then—the defendant objecting thereto—ordered the Clerk to draw a jury for the trial of the cause from the jurors summoned on the special venire. *Held*—not to be error. *Dayton et al. v. Warren*, 233.

48. Action by plaintiff against defendant under *chap. 76 of Comp. Stat.* *Held*—that the remedy given by this chapter is a "common law remedy," and is therefore saved to suitors by the judiciary act of the United States passed in 1789. That the District Courts of this State have jurisdiction in this class of cases. *Reynolds v. Steamboat Favorite*, 242; *Morin v. Steamboat F. Sigel*, 250.

49. Errors occurring on the trial prejudicial to the respondent, but not complained of by the appellant, will not in general be considered in the Supreme Court. *Winona & St. Peter R. R. Co. v. Denman et al.*, 267.

50. The Clerk of the District Court appended to his return certain papers not filed in his office, and which he was prohibited from filing by the order of the vol. x.—63.

Court below. On motion they were stricken from the return. *Mayall et al. v. Burke et al.*, 285.

51. An appeal does not lie from a mere refusal of the District Court to entertain a motion. *Id.*

52. In an application for a certiorari to a Justice's Court, the presentation of the affidavit required by *sec. 124, chap. 59, Comp. Stat.*, within twenty days after the rendition of the judgment, is an essential requisite to the authority of the Judge to allow the writ of certiorari. *Cunningham v. La Crosse & St. Paul Packet Co.*, 299.

53. The omission to state in the affidavit that the application is made in good faith and not for the purpose of delay, renders the affidavit substantially defective, and the Judge has no authority to allow the writ; nor is the affidavit amendable. *Ibid.*

54. Where a cause is regularly noticed and placed upon the calendar for trial, an amendment of the pleadings does not render a new notice of trial necessary. *Stevens v. Currey et al.*, 316.

55. At the proper time on the trial in the Court below, the plaintiff's counsel submitted to the Court five distinct propositions or requests—*separately numbered*, and asked the Court to charge the jury as therein requested. The Court took up the propositions and ruled upon them *separately*, denying or modifying each. The plaintiff's counsel "excepted to said refusals and modifications and to said instructions as given." *Held*—that this exception applied to the ruling of the Court in *each* proposition, and was therefore sufficiently specific. *Schurmeier v. Johnson et al.*, 319.

56. The rule as to the requisites of affidavits for publication of summons, laid down in *Mackubin & Edgerton v. Smith*, 5 *Minn.*, 267, applied and followed. *Harrington v. Loomis et al.*, 366.

57. On an appeal from a Justice of the Peace, none of the appeal papers are subject to a stamp duty. *Dorman v. Bayley*, 383.

58. Errors assigned by the defendant in error, but not complained of by the plaintiff in error, will not be regarded. *Edgerton et al. v. Jones et al.*, 427.

59. A motion to dismiss an action based on the ground that plaintiff is a married woman suing alone, and so the Court has no jurisdiction of her person, should be denied. The objection goes to her capacity to sue, and must be taken by answer or demurrer. *Tapley v. Tapley et al.*, 448.

See COUNTER-CLAIM, 1; INJUNCTION, 1; JUSTICE OF THE PEACE, 1, 2, 3; APPEAL, 4; COMPLAINT, 1, 3, 4, 5; PROCESS, 2, 3; DEMURRER, 2; ACTION, 10.

PRINCIPAL AND SURETY.

1. The obligation not to give time to the principal depends upon a knowledge of

the real character in which the surety entered into the contract. If, therefore, the fact of the suretyship does not appear on the face of the contract, the surety will not be discharged from liability in consequence of a variation of the contract, if at the time of the act complained of the creditor had not notice that the relation of suretyship existed; and such notice is not presumed in favor of the surety, but must be proven. *Agnew v. Merritt et al.*, 308.

PROBATE COURT.

2. Where, upon the canvass of votes cast at a general election, C. was declared duly elected to the office of Judge of Probate, received a certificate, qualified as by law required, and made a demand upon his predecessor for the books, &c., of the office, it appearing that L.'s term of office had expired; *Held*—that upon the refusal of L. to deliver up the records, C. was entitled to a peremptory writ of mandamus to enforce the delivery. *Crowell v. Lambert*, 369.

PROCEEDINGS AGAINST BOATS.

1. Action of plaintiff against defendant under *Chap. 76 of the Comp. Stat.*; *Held*—that the remedy given by this chapter is a "common law remedy," and is therefore saved to suitors by the judiciary act of the United States, passed in 1789. That the District Courts of this State have jurisdiction in this class of cases. *Reynolds v. Steamboat Favorite*, 242. *Morin v. Steamboat F. Sigel*, 250.

PROCESS.

1. The rule as to the requisites of affidavits for publication of summons, laid down in *Mackubin & Edgerton v. Smith*, 5 *Minn.*, 267, applied and followed. *Harrington v. Loomis et al.*, 366.

2. A summons can only be served on a foreign corporation by publication. *Sullivan v. La Crosse & Minn. Packet Co.*, 386.

3. Service on the President or managing agent of such corporation within this State is a nullity, and confers no jurisdiction on the Court, and in such case the defendant may maintain a writ of error to reverse the judgment. *Id.*

PROMISSORY NOTE.

1. Where a negotiable note payable to order is transferred without indorsement, the holder takes it as a mere chose in action, and while he may maintain an action upon it in his own name, he must prove the transfer to himself if denied, and mere possession is not *prima facie* evidence of ownership. *Van Eman v. Stanchfield et al.*, 255.

See SCHOOLS AND SCHOOL DISTRICTS, 3.

RAILROADS.

1. The Legislature cannot appropriate land laid out into streets, &c., for any use not authorized by the dedication, nor can they authorize a Railroad Com-

pany to use the same for a railroad track without compensation to the owner of the fee. *Schurmeier v. St. Paul & P. R. R. Co.*, 82.

2. The use of streets and public landings by a Railroad Company for a railroad track without legal authority, may be restrained by injunction by the owner of the fee, when such use is a special injury to him. *Id.*

3. Under the charter of the Winona and St. Peter Railroad Company, in determining the compensation to be paid for the appropriation of land for railroad purposes, neither the commissioners nor the District Court are confined in their inquiries to the damage done to or the value of the strip of land actually taken for right of way. *Winona & St. Peter R. R. Co. v. Denman et al.*, 267.

4. It is proper for them to inquire into the effect of such taking upon the whole farm out of which the strip is taken; and it makes no difference that the Court or Judge, as preliminary to the appointment of commissioners, have determined the title to the strip only. *Id.*

5. In ascertaining such compensation, it is proper to enquire what is the value of the strip taken at the time when the question of compensation is passed upon by the commissioners. *Id.*

6. The expense of building and maintaining additional fences rendered necessary by the construction of the road, is a proper element of damage. *Id.*

7. R. sues as sheriff, by virtue of a levy upon the unpaid amount of subscription of S., the defendant, to the stock of the M. & C. V. R. R. Co., under an execution upon a judgment in favor of McD., G. & Co. against said R. R. Co. *Held*—that the right of action depends entirely upon *sec. 109, chap. 61 of the Pub. Stat.* *Robertson v. Sibley*, 323.

8. The M. & C. V. R. R. Co., was incorporated by the Territorial Legislature by special act, approved March 1, 1856. It does not, therefore, come within the provisions of the State Constitution relating to corporations. *Id.*

9. The act of incorporation contains no provision making the stockholders individually liable to any extent for the debts of the Company, nor are the provisions of the public statutes *p. 332, secs. 321-2*, applicable; the liability of the defendant as a stockholder, therefore, is unaffected by statutory provision. *Ibid.*

10. Assuming for the purposes of this action that *subdiv. 3, sec. 148, Pub. Stat.*, embraces demands of a legal and equitable character; *Held*—that the rights and liabilities of the parties to the debt levied on, must characterize it as a legal or equitable claim, and that the sheriff can avail himself only of equities existing between such parties, and not of such as may exist in favor of the judgment creditor against any of such parties; the plaintiff, therefore, in this case can have no greater rights against the stockholder than the Railroad Company has. *Ibid.*

11. The complaint alleges that the defendant, after the organization of the Company, duly subscribed for and thereby agreed to pay to said Railroad Company two hundred and fifty shares of one hundred dollars each of the capital stock of said Company, but has not paid to exceed five per cent. thereof. The charter provides that the directors may require and receive payment of the subscription to the capital stock at such time and in such proportion, not exceeding ten per cent. at any one installment, as they shall see fit, and may declare said stock forfeited and all payments thereon, or otherwise, on a failure to make payment as required, provided they shall first give thirty days notice of such requisition. *Held*—that the subscription pleaded must be taken as a naked subscription for stock showing no express promise to pay, and as between the stockholders and the company the terms of the charter regulating the subscription for stock must be considered as entering into the contract between the stockholder and the company. *Id.*

12. The terms of the subscription must be the measure of the defendant's liability to the Company, and unless by these terms the debt is recoverable, no action can be maintained by the Company. *Id.*

13. The complaint does not allege a call for any installment or for any amount, either upon the whole stock or the defendant individually, but avers that no call has been made; nor does it allege any default except that "the defendant has not paid to exceed five per cent. of the amount of stock subscribed by him." *Held*—that this state of facts does not show a breach of the contract by the defendant upon which the Company could maintain an action against him. *Id.*

14. The complaint alleges the insolvency of the Company, its refusal to call for installments of stock subscription, or make provision for the payment of its debts; the total abandonment of the work for which it was created, and of its own organization since some time in 1859. *Held*—That whatever might be the effect of these facts in a proceeding in equity by a creditor against the corporation and its stockholders, they constitute no ground of action by the Company against a stockholder, but the reverse, and as the sheriff, the plaintiff in this action, has no greater rights than the Company, do not constitute a ground of action in him. *Id.*

RECOGNIZANCE.

1. Taking of recognizances in the course of proceedings on writs of habeas corpus, is within the jurisdiction of a Judge of the Supreme Court. *State v. Grant*, 39.

2. In a recognizance taken before a Judge of the Supreme Court, it is only necessary that it appear upon the face of the recognizance that it was taken in a case in which the Judge might take a recognizance, and is conditioned to do some act for the performance of which a recognizance may properly be taken. *Ibid.*

3. A recognizance taken out of Court cannot become a record until it is filed in the proper Court, and it must be a record before it is a complete obligation. *Ibid.*

4. In a recognizance in a criminal case entered into by the defendant and a surety conditioned for the appearance of the defendant to answer, &c., it is not essential that the surety be called; if the defendant is called and fails to appear it is a breach of the recognizance, although the better practice is to call the surety also. *Id.*

5. In an action upon a recognizance it is not necessary to allege that the penalty has not been paid. *Id.*

6. The proceedings in case of the forfeiture of a recognizance are prescribed by statute, *chapter 103, sections 28-9-30-1*; all that would seem to be required by this statute before bringing an action to recover the penalty of the recognizance, is a record of the default of the person under recognizance. *Id.*

RECORD.

1. The record of a conveyance of real estate by husband to wife stands upon the same footing as the record of any other conveyance, so far as the question of notice is concerned. *Wilder et al. v. Brooks et al.*, 50.

2. A docket kept by the Clerk of the Court, marked in gilt letters "Register of Actions," and in writing "Judgment Book," contained a series of entries, the last of which was without date and in the following form: "Judgment entered against defendant and in favor of said plaintiff for three hundred and twenty-eight dollars and fifty cents [\$328.50]." All the entries preceding it and with which it was connected were mere minutes of the proceedings in the action. *Held*—that the entry referring to judgment was a mere minute of the entry of judgment. *Brown v. Hathaway et al.*, 303.

3. A docket entry which is a mere minute is not admissible to prove a judgment. *Id.*

See RECOGNIZANCE, 3. JUSTICE OF THE PEACE, 4, 5, 6.

REDEMPTION.

1. When lands sold for taxes under *chap. 4 of Laws of 1862*, have been redeemed, the County Treasurer is by law required to pay over to the purchaser the full amount for which such property sold, with interest on such amount from the day of sale to the time of redemption, without making any deduction therefrom for fees. *Stuart v. Walker*, 296.

See MORTGAGE, 1.

REPLEVIN.

1. In an action to recover possession of personal property *wrongfully detained*, and for damages, the want of an allegation of demand and refusal is cured by a

verdict for the plaintiff, if the complaint avers generally that the defendant "wrongfully detains," &c. *Hurd v. Simonton*, 423.

RIPARIAN RIGHTS.

1. The mere fact of riparian ownership does not authorize a riparian owner to run a public ferry to and from his own shore. *McRoberts v. Washburne et al.*, 23.

2. A person who has received a patent from the United States for lands bordering on the Mississippi River takes the title at least to low water mark; and the river and not the meander line is the boundary of such lands. *Schurmeier v. St. Paul & P. R. R. Co.*, 82.

SCHOOLS AND SCHOOL DISTRICTS.

1. *Subdivision 4, Sec. 70, Chap. 23, Comp. Stat.*, limits the fund out of which payment for the purposes specified therein shall be made by the trustees of a school district, but does not require that the funds shall be collected and paid to the trustees before they can contract for or purchase the objects embraced in the statute. *Robbins v. School Dist. No. 1, Anoka Co.*, 340.

2. Under the provisions of this statute the trustees of a school district have authority to incur an indebtedness for the erection of a school house for the district, and postpone the payment of such indebtedness to a future day, and contract to pay interest on such indebtedness. *Id.*

3. Evidences of such indebtedness, made by the trustees to R., in the form of promissory notes, are good between the parties as contracts for forbearance and promises to pay the amounts therein specified; and will bind the successors in office of the trustees; and an action may be maintained thereon by the payee against the district, whether the trustees are in possession of the particular fund out of which the debt is payable or not. *Id.*

4. Under *sec. 7, chap. 11, Sess. Laws of 1861*, the trustees of the school district of the town of Anoka, by their action in pursuance of said section, united Subdistricts Nos. One and Two of said Town, under the style of Subdistrict No. One of the Town of Anoka. *Held*—That the intention of the trustees must determine whether their action is a merger of Subdistrict No. Two in Subdistrict No. One or not, and where their action is pleaded as such merger, a demurrer to the complaint admits the fact. *Id.*

5. The action of the trustees under this section, uniting or consolidating two subdistricts, both being corporations, must be regarded as a merger of the old corporations into the new one, and in the absence of provision to the contrary, the new corporation succeeds to the rights and liabilities of the old ones. *Id.*

6. The saving clause in *section 60* of the act preserves the right of action, but the remedy must be had against the corporation as it now exists. *Id.*

7. The 9th section of an act approved Feb. 28, 1860, entitled "An act for the support and better regulation of common schools in the City of St. Anthony," is in the following language: "That whenever said board [of Education] shall deem it necessary to purchase or erect a school house or school houses for said district, or to purchase a site or sites for the same, they shall call a meeting of the legal voters in said district, by giving at least ten days notice of the time and place and object of said meeting in some newspaper printed in and in general circulation in said district; and the President of said Board, and in his absence one of the other directors, shall act as chairman of said meeting, and said meeting may determine by a majority vote upon the erection of a school house or school houses, and the purchase of a site or sites therefor, and the amount of money to be raised for the purpose aforesaid; which money so voted shall be thereupon certified by the Board of Education, by its President and Secretary, to the City Council; and thereupon the said City Council shall within thirty days thereafter proceed to levy such amount of money upon the taxable property in said district; said tax to be levied and collected as other taxes of said city are levied and collected, and to be paid over as soon as collected to the Treasurer for said Board of Education." *Held*—on an application for mandamus, that under this section,—1. A preamble in the following language, "Whereas it is deemed necessary by the Board of Education of the City of St. Anthony to purchase a site or sites and to erect thereon a school house or school houses for the school district comprised within the limits of the said city of St. Anthony," &c., adopted by said Board, with a resolution calling a meeting of the legal voters, was sufficiently definite to justify them in calling such a meeting. 2. That the meeting of legal voters must determine upon the number of houses to be erected and the number of sites to be purchased, and must specify a definite and certain sum of money for such purpose, and that this action must precede the levying of the tax. *State ex rel. v. City of St. Anthony*, 433.

8. Where the equitable estate to certain premises were transferred from a school district and vested in the Board of Education of Saint Anthony, and to secure the property and legal title thereto the said Board contracted to pay the purchase price of the premises, in pursuance of an agreement entered into between the owner of the premises and such school district, it was not a purchase within the meaning of section 9 of the act incorporating the Board of Education, and the contract is valid. *Connor v. Board of Education of the City of St. Anthony*, 439.

SHERIFF.

1. R. sues as sheriff, by virtue of a levy upon the unpaid amount of subscription of S., the defendant, to the stock of the M. & C. V. R. R. Co., under an execution upon a judgment in favor of McD., G. & Co. against said R. R. Co. *Held*—That the right of action depends entirely upon sec. 109, chap. 61 of the Public Statutes. *Robertson v. Sibley*, 323.

2. Assuming for the purposes of this action that *subdiv. 3, sec. 148, Pub. Stat.*, embraces demands of a legal and equitable character; *Held*—that the rights and liabilities of the parties to the *debt levied on*, must characterize it as a legal or equitable claim, and that the sheriff can avail himself only of equities existing between such parties, and not of such as may exist in favor of the judgment creditor against any of such parties; the plaintiff, therefore, in this case can have no greater rights against the stockholder than the Railroad Company has. *Ibid.*

3. In pursuance of the power of sale in a mortgage, B. (a mortgagee) advertised for sale the mortgaged premises, and the sheriff, acting as his agent, at the time and place fixed, offered said premises for sale, and B. bid them off for \$500. After the sheriff had sold certain other lands, and in fifteen or twenty minutes after the *first* sale, he *re-offered* the premises first sold, and they were again bid off by B. for \$542.26. *Held*—That the power of the sheriff or B. to sell was exhausted by the first sale, and therefore the second sale was a nullity. *Paquin v. Braley*, 379.

STREET CERTIFICATES.

1. When street certificates have been issued to a party under and in pursuance of the provisions of *sec. 10, chap. 7, of the Amended Charter of the City of Saint Paul*, the city is not liable on said certificates, or for the work and labor on account of which they were issued. In the assessment and sale of the lots (chargeable) for the amount due on the certificates, the city acts for the certificate holders. The city neither assumes nor guarantees the payment of said certificates, nor becomes liable to the holders thereof by proceeding to collect the amount due thereon, nor by reason of the fact that said lots for want of bidders are struck off to the city. *Lovell v. City of St. Paul*, 290.

SUMMONS.

See PROCESS, 1, 2, 3.

SUPREME COURT.

1. The statute conferring power upon any Judge of the Supreme Court to allow writs of habeas corpus, is not in conflict with the State Constitution. *State v. Grant*, 39.

2. Taking of recognizances in the course of proceedings on writs of habeas corpus, is within the jurisdiction of a Judge of the Supreme Court. *Id.*

3. In a recognizance taken before a Judge of the Supreme Court, it is only necessary that it appear upon the face of the recognizance that it was taken in a case in which the Judge might take a recognizance, and is conditioned to do some act for the performance of which a recognizance may properly be taken. *Ibid.*

4. *Section 15, Chap. 4, Compiled Statutes*, which provides that "either House vol. x.—64

may, by resolution, request the opinion of the Supreme Court, or any one or more of the Judges thereof, upon a given subject, and it shall be the duty of such Court or Judges when so requested, respectively, to give such opinion in writing," is unconstitutional and void, and therefore imposes no duty on the Court. *In the Matter of the Application of the Senate*, 78.

5. Any opinion expressed in pursuance of action under said section is extra-judicial, and no official responsibility attaches to the Judge or Court voluntarily giving such opinion. *Id.*

6. Errors occurring on the trial prejudicial to the respondent, but not complained of by the appellant, will not in general be considered in the Supreme Court. *Winona & St. Peter R. R. Co. v. Denman et al.*, 267.

7. The Supreme Court has authority to issue the peremptory writ of mandamus. *Crowell v. Lambert*, 369.

8. Errors assigned by the defendant in error, but not complained of by the plaintiff in error, will not be regarded. *Edgerton et al. v. Jones et al.*, 427.

SURETY.

See PRINCIPAL AND SURETY, 1.

TAXES AND TAX SALES.

1. The notice of sale required by the act entitled "An act in relation to the redemption of lands sold for taxes, and relating to taxes and tax sales, approved March 11, 1862," is essential to the validity of the sale. *Bidwell v. Webb*, 59.

2. A notice of sale containing no further description of the premises than the following, viz :

"ROBERTS & RANDALL'S ADDITION.

"Lot 11, Blk 20

"Lot 12, Blk 20,"

And nowhere describing said lots or said Addition as being in the city of Saint Paul, nor in Ramsey county, nor mentioning nor referring in any manner to said county, except that the notice was headed "Auditor's Office, Ramsey County, Minn., St. Paul, Dec. 8, 1862," is insufficient. *Id.*

3. The statement at the head of the notice is merely the date of the advertisement identifying the Auditor's office whence and the time when the notice issued, and cannot be regarded as referring to the premises to be sold, or aid in the description. *Id.*

4. The purchaser of the premises at a tax sale in pursuance of such notice, acquired no title. *Id.*

5. When street certificates have been issued to a party under and in pursuance of the provisions of *Sec. 10, Chap. 7 of the Amended Charter of the City of Saint Paul*, the city is not liable on said certificates, or for the work and labor on ac-

count of which they were issued. In the assessment and sale of the lots (chargeable) for the amount due on the certificates, the city acts for the certificate holders. The city neither assumes nor guarantees the payment of said certificates, nor becomes liable to the holders thereof by proceeding to collect the amount due thereon, nor by reason of the fact that said lots for want of bidders are struck off to the city. *Lovell v. City of St. Paul*, 290.

6. When lands sold for taxes under *chap. 4 of Laws of 1862*, have been redeemed, the County Treasurer is by law required to pay over to the purchaser the full amount for which such property sold, with interest on such amount from the day of sale to the time of redemption, without making any deduction therefrom for fees. *Stuart v. Walker*, 296.

See PLEADINGS AND PRACTICE, 14.

TRUSTS AND TRUSTEES.

1. S. executed a quit-claim deed running to A. of certain land on the Half-Breed Reservation. At the time of executing such deed the title of the land was in the United States, subject to a usufruct by the half breeds of the Sioux nation. The deed contained a covenant by which S. bound himself, when he should acquire title from the United States, to make such further or other conveyance of the premises to A., his heirs or assigns, as should be valid and effectual to convey the premises, &c. Subsequently S. acquired the title from C., who acquired it from the United States. Afterwards by a full covenant warranty deed S. conveyed to H. all his "right, title, interest, estate, property, possession, claim or demand whatever to said premises." *Held*—That the quit-claim deed and covenant were not illegal; that when S. acquired the title he held it in trust for the performance of his covenant, and that H. took it subject to the same trust. *Hope v. Stone et al.*, 141.

2. The German Land Association, being a mere voluntary association of persons unincorporated, has no legal capacity to take or hold real property; nor can such Association be the beneficiary of a trust. A deed, therefore, to A, B & C, in trust for such Association, is void. *German Land Association v. Scholter*, 331.

3. Plaintiffs and defendant were owners as tenants in common of a judgment. By the terms of the assignment either of the assignees were expressly authorized to collect the judgment to their joint use. The defendant, one of the assignees, proceeded to collect the judgment and at the sale under the execution bid off the property in his own name, and in due time the title in him became perfect. *Held*—1. That to the extent of the purchase the defendant acted within the scope of the power conferred by the assignment. 2. That in the absence of any circumstances showing fraud or bad faith, or that the action of the defendant was not for the benefit of the assignees, or that the purchase was not intend-

ed to be in pursuance of the power, the defendant holds the lands in trust for the plaintiff to the extent of her interest in the judgment; and 3. That the defendant is not liable as for money had and received. *Holmes et al. v. Campbell*, 401.

VARIANCE.

1. In an action for malicious prosecution, the complaint, after alleging the examination before the Justice, avers: "at which examination the defendant did not appear to support his said complaint, and upon such examination the said Justice adjudged that the plaintiff was not guilty of such offence, and that there was no probable cause for charging him therewith, and fully acquitted him thereof." The record offered showed, that upon the examination the complainant did not appear, and as there was no witness for the prosecution the case was dismissed and the prisoner discharged, &c. *Held*—That the docket was admissible to show the termination of the prosecution, and that there was no variance between the proof and allegation. *Chapman v. Dodd*, 350.

See PLEADINGS AND PRACTICE, 29.

VENUE.

1. Errors of judgment do not amount to prejudice or ill will on the part of a Judge so as to authorize a change of venue. *Burke v. Mayall et al.*, 287.

VERDICT.

1. As a general rule a verdict does not operate as an estoppel until it has received the sanction of the Court and has passed into a judgment. *Schurmeier v. Johnson et al.*, 319.

See JUDGMENT, 2; MALICIOUS PROSECUTION, 5.

WITNESS.

1. When the witness himself may be produced his deposition is not admissible. *Chapman v. Dodd*, 350.

2. As under our legislation the defendant is a competent witness, he stands in the same position as other witnesses. *Id.*

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